Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

20TH CENTURY INSURANCE COMPANY,

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES; LINDA P. AHLES,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a blanket retroactive statutory nullification of a long-approved standardized contract term consistent with the contract, due process, and ex post facto clauses of the Constitution? Specifically, may the California Legislature revive *all* contractually time-barred insurance claims arising out of the 1994 Northridge earthquake – reopening contract rights in hundreds of thousands of policies – based on reports that *some* insurers treated *some* insureds unfairly?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner 20th Century Insurance Company is now doing business as 21st Century Insurance Company. 21st Century Insurance Company is a California corporation admitted to transact insurance business in California and other states. 21st Century Insurance Company is a wholly owned subsidiary of 21st Century Insurance Group, a publicly traded California corporation. American International Group holds the majority of 21st Century Insurance Group's stock.

STATEMENT PURSUANT TO RULE 29.4(c)

Because this petition draws into question the constitutionality of California Code of Civil Procedure section 340.9, 28 U.S.C. section 2403(b) may be applicable.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

STATEMENT PURSUANT TO RULE 29.4(c) iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINION AND ORDERS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE PETITION 8

I. CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 340.9 VIOLATES THE CONTRACT CLAUSE BY VOIDING HUNDREDS OF THOUSANDS OF INSURANCE CONTRACTS AND SETTLEMENT AGREEMENTS 8

A. The Contract Clause Prohibits Legislation Impairing Contracts Except Under Narrow, Closely Scrutinized Circumstances 8

B. Section 340.9 Substantially Impairs Core Insurance Policy Terms And Voids Settlement Agreements 10

TABLE OF CONTENTS – Continued

Page

C. The Impairment Is Not Supported By A Significant And Legitimate Public Purpose ... 19

D. The Impairment Is Neither Reasonable Nor Necessary 21

II. SECTION 340.9 VIOLATES DUE PROCESS BY DESTROYING VESTED CONTRACT RIGHTS.. 23

III. SECTION 340.9 VIOLATES THE EX POST FACTO CLAUSE BY RETROACTIVELY ELIMINATING CONTRACT RIGHTS WITHOUT NOTICE AND NECESSARY FINDINGS 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

A. J. Industries, Inc. v. Ver Halen
142 Cal. Rptr. 383, 75 Cal. App. 3d 751 (1977) 19

Affiliated FM Ins. v. Bd. of Educ. of Chicago
23 F.3d 1261 (7th Cir. 1994) 15

Allied Structural Steel Co. v. Spannaus
438 U.S. 234 (1978) 8, 18

Basich v. Allstate Ins. Co
105 Cal. Rptr. 2d 153, 87 Cal. App. 4th 1112
(2001) 23

Bell v. Burson
402 U.S. 535 (1971) 24

Calder v. Bull
3 U.S. (3 Dall.) 386 (1798) 5, 26

California Union Ins. Co. v. Poppy Ridge Partners
274 Cal. Rptr. 191, 224 Cal. App. 3d 897 (1990) 13

Campbell v. Holt
115 U.S. 620 (1885) 11

Eastern Enterprises v. Apfel
524 U.S. 498 (1998) 5, 6, 24, 25, 26

Energy Reserves Group, Inc. v. Kansas Power &
Light Co.
459 U.S. 400 (1983) 9, 10, 14, 16, 19

Farmers' Co-Operative Creamery Co. v. Iowa
State Ins. Co.
112 Iowa 608, 84 N.W. 904 (1900) 12

TABLE OF AUTHORITIES – Continued

Page

Fletcher v. Peck
10 U.S. (6 Cranch) 87 (1810) 9, 19

Folsom v. Butte County Assn. of Governments
652 P.2d 437, 32 Cal. 3d 668 (1982) 18

Forman v. Chicago Title Ins. Co.
38 Cal. Rptr. 2d 790, 32 Cal. App. 4th 998 (1995) 23

Great American West, Inc. v. Safeco Ins.
277 Cal. Rptr. 349, 226 Cal. App. 3d 1145
(1991) 13, 15, 23, 24

Home Ins. Co. v. Dick
281 U.S. 397 (1930) 4, 11, 12, 23

Home Ins. Co. v. Landmark Ins. Co.
253 Cal. Rptr. 277, 205 Cal. App. 3d 1388 (1988) 17

Joint Anti-Fascist Refugee Committee v. McGrath
341 U.S. 123 (1951) 24

Kee v. Shelter Ins.
852 S.W.2d 226 (Tenn. 1993) 12

Landgraf v. USI Film Products
511 U.S. 244 (1994) 5, 25

In re Marriage of Assemi
872 P.2d 1190, 7 Cal. 4th 896 (1994) 18

McClure v. McClure
34 P. 822, 100 Cal. 339 (1893) 18

Morrissey v. Brewer
408 U.S. 471 (1972) 24

Mulligan v. Hilton
305 Mass. 5, 24 N.E. 2d 676 (1940) 12

TABLE OF AUTHORITIES – Continued

Page

Order of United Commercial Travelers v. Wolfe
331 U.S. 586 (1947) 13

Prudential-LMI Com. Insurance v. Superior Court
274 Cal Rptr. 387, 51 Cal. 3d 674 (1990)..... 23

Riddlesbarger v. Hartford Ins. Co.
74 U.S. 386, 19 L. Ed. 257 (1868)..... 13

Sacks Realty Co., Inc. v. Newark Ins. Co.
34 Conn. Supp. 564, 377 A.2d 858 (1992)..... 12

Serrano v. Aetna Ins. Co.
233 Conn. 437, 664 A.2d 279 (1995) 12

St. Paul Fire & Marine Ins. Co. v. House
73 Md. App. 118, 533 A.2d 301 (1987) 15, 17

The North Western Ins. Co. v. The Phoenix Oil & Candle Co.
31 Pa. 448 (1858) 13

Travelers v. Budget Rent-A-Car Systems
901 F.2d 765 (9th Cir. 1990)..... 15

Trustees of Dartmouth College v. Woodward
17 U.S. (4 Wheat.) 518 (1819) 9

Vu v. Prudential Property & Cas. Ins. Co.
33 P.3d 487, 26 Cal. 4th 1142 (2001)..... 3, 15, 19, 23

Weaver v. Graham
450 U.S. 24 (1981) 24

Weisberg v. Royal Ins. Co. of America
124 Ill. App. 3d 864, 464 N.E. 2d 1170 (1984) 12

TABLE OF AUTHORITIES – Continued

Page

Wetzel v. Lou Ehlers Cadillac
222 F.3d 643 (9th Cir. 2000) 14

Williams & Bliss v. The Vermont Mutual Fire Ins. Co.
20 Vt. 222 (1848) 13

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV 2

U.S. Const. Art. 1, § 9, cl. 3 .....2, 26

U.S. Const. Art. I, § 10, cl. 1.....2, 8

STATUTES

28 U.S.C. § 1257(a) 2

California Code of Civil Procedure section 340.9 ... *passim*

MISCELLANEOUS

Couch on Insurance (3d ed. 2000)
§ 235:4 24

§ 235:11 13

Holmes, Appleman on Insurance (2d ed. 1996)
§ 1.11 13

James Madison, The Federalist No. 44..... 8

2 Rotunda & Nowak, Treatise on Constitutional
Law (3d ed. 1999) § 15.8 .....8, 10

2 J. Story, Commentaries on the Constitution
§ 1398 (5th ed. 1891) 24, 26

PETITION FOR WRIT OF CERTIORARI

20th Century Insurance Company respectfully petitions this Court for a writ of certiorari to review the decision of the California Court of Appeal, Second Appellate District, filed in the above-entitled proceeding on July 24, 2001, of which the California Supreme Court summarily denied review on October 17, 2001, with two justices dissenting.

OPINION AND ORDERS BELOW

The opinion of the California Court of Appeal is reported at 109 Cal. Rptr. 2d 611, 90 Cal. App. 4th 1247 (2001) and is reproduced in the appendix at App. 1-50. The appendix also contains the order of the California Court of Appeal denying a rehearing (App. 51), the order of the California Supreme Court denying review (App. 57), and the orders of the Los Angeles Superior Court ultimately reviving plaintiff Linda Ahles's claim (App. 52, 55), which are unreported.

STATEMENT OF JURISDICTION

The California Court of Appeal entered its judgment on July 24, 2001. That court denied a timely petition for rehearing on August 20, 2001. On October 17, 2001, the California Supreme Court denied a timely petition for review (with two of six justices voting to grant review).

The jurisdiction of this Court is invoked under 28 United States Code section 1257(a) (West 1993).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition for a writ of certiorari involves:

(1) the Contract Clause of the Constitution of the United States, U.S. Const. Art. I, § 10, cl. 1, which provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts";

(2) the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, U.S. Const. Amend. XIV, which provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law";

(3) the Ex Post Facto Clause of the Constitution of the United States, U.S. Const. Art. 1, § 9, cl. 3, provides that "No . . . ex post facto Law shall be passed"; and

(4) California Code of Civil Procedure section 340.9, which is reproduced in full in the appendix. (App. 58.)

INTRODUCTION

Virtually all property insurance policies issued in this country over the last 200 years have contained a suit limitations provision which prescribes the time – usually one year – in which any suit under the policy must be brought. Courts recognize that the right of repose created by these long-standing contractual limitation periods is

supported by strong public policy, a policy as strong as the policy favoring disposition of disputes on the merits. *See, e.g., Vu v. Prudential Property & Cas. Ins. Co.*, 33 P.3d 487, 490-91, 26 Cal. 4th 1142, 1148-49 (2001). We are aware of no court or legislature that has questioned the fairness and utility of these ubiquitous provisions.

The California Legislature has nonetheless negated these contract provisions for insurance claims concerning one particular event – the 1994 Northridge earthquake. Effective seven years after the earthquake, California Code of Civil Procedure section 340.9 revives those Northridge earthquake claims – and there are hundreds of thousands of them – that were time-barred years earlier by the contractual suit limitations provisions. Moreover, under one reading of the statute, even certain settlement contracts resolving Northridge earthquake claims are voided. The legislative history contains no factual findings by the Legislature, but demonstrates that the statute rests entirely on allegations by proponents of the law that *some* insurers were treating *some* insureds unfairly. The Legislature did not find that the insurance policies or settlement contracts themselves were unlawful or unfair in any way, nor did it find any inadequacy in the existing contract law defenses and other established remedies for those insureds who might have been treated unfairly.

This retroactive legislation, by dramatically upsetting settled expectations, is a wholesale assault on economic rights. The Constitution protects against this, however, in the contract, due process, and ex post facto clauses.

The California Court of Appeal in this case found no contract clause violation because it deemed the suit limitations provision to be merely a creature of statute, not entitled to the legal status and protection afforded to other private contracts. Like state legislatures throughout the country, the California Legislature had statutorily endorsed the long-standing contract provision, making it part of a statutory form insurance policy. The court below concluded the clause thus became subject to the Legislature's power to amend a *legislatively*-created period of repose. But this Court has specifically rejected analyzing the legislative impairment of *contract* suit limitations provisions as a mere alteration of *statutory* limitations provisions:

> It is true that a state may extend the time within which suit may be brought in its own courts, *if, in doing so, it violates no agreement of the parties.* . . . [But when] the parties have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement of the contract after the time has expired increases their obligation and imposes a burden not contracted for.

Home Ins. Co. v. Dick, 281 U.S. 397, 408-09 (1930) (emphasis added).

To the extent it may overturn executed settlement agreements, the statute is invalid for the same reasons. Like the statute struck down by this Court in *Home v. Dick*, section 340.9 is an unconstitutional impairment of private contract rights. Its destruction of the vested substantive right to repose of stale claims violates the contract clause as well as the due process clause, which

protects against such "retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).

Section 340.9's retroactive, blanket punishment of all insurers also violates the ex post facto clause. Although that clause has been confined to the criminal context since *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), this Court should "reconsider *Calder*" and rule that a "retroactive civil law" can be "unconstitutional under the *Ex Post Facto* Clause." *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (1998) (Thomas, J., concurring).

In light of section 340.9, insurers conducting business in California face unanticipated mounting individual claims, numerous pending class actions, and assorted "non-class" representative actions under unfair competition statutes, all asserting a myriad of "revived" rights under section 340.9. Insurers have already paid over $13 billion on account of the Northridge earthquake.[1] The additional cost to insurers in administrative expenses alone in responding to revived claims on long-since

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[1] According to one legislative committee analysis, by 2000, insurance companies had already paid some 450,000 Northridge earthquake claims in the sum of $12.5 billion. 20th Century's Request for Judicial Notice (RJN), granted by the court below and lodged with this Court, tab A, at 55 (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, at 2). Another bill analysis indicates insurers had paid some 600,000 claims in the sum of $15.3 billion. RJN, tab A, at 41 (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, at 4).

closed files will be enormous. Moreover, insureds' counsel threaten suits to collect tort and punitive damages that they say are now payable as a result of the state Legislature's rewriting of the applicable insurance contracts. And if section 340.9 is upheld, the legislatures of California and other states may feel free to destroy many other contractual rights that, like the suit limitations provision, have been statutorily endorsed, such as commercial leases, uniform code contracts, and other business contracts.

"[F]or centuries our law has harbored a singular distrust of retroactive statutes." *Eastern Enterprises*, 524 U.S. at 547 (Kennedy, J., concurring and dissenting). Section 340.9 deserves a no less skeptical review by this Court.

STATEMENT OF THE CASE

The proponents of California Code of Civil Procedure section 340.9 argued that reviving claims against insurers despite the expiration of contractual suit limitations provisions was appropriate because, they said, *some* insurers misled *some* insureds about the "nature and extent of damage to their homes." RJN, tab A, at 33 (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 9, 2000, at 4.) Making no findings about the extent to which insurers actually engaged in the wrongdoing alleged, the Legislature imposed collective guilt on *all* insurers and relieved *all* insureds of the duty under their contracts to file timely claims for damage arising out of the earthquake, so long as the insureds had

in any way "contacted" their insurer or the insurer's agent before January 1, 2000.

That legislative act paved the way for plaintiff Linda Ahles to bring a "revived" claim for earthquake damage. Plaintiff's homeowners insurance with defendant and petitioner 20th Century Insurance Company included an endorsement for earthquake coverage. (App. 4.) Her policy also contained a standard one-year suit provision, requiring any action against 20th Century to be brought "within one year after the occurrence causing loss or damage."

Several months after the January 1994 Northridge earthquake, plaintiff reported damage to her property and obtained policy benefits for some repairs. More than *four years* after the earthquake and the payment of plaintiff's claim, plaintiff made a supplemental claim. She contended a termite inspector had observed earthquake damage that had not been discovered or considered during 20th Century's adjustment of her initial claim.

20th Century concluded the damage plaintiff reported in her supplemental claim had not been caused by the earthquake. 20th Century denied plaintiff's supplemental claim on that basis, as well as on the ground that the supplemental claim was untimely.

In 1999, plaintiff sued 20th Century in state court for breach of contract and bad faith, based on the alleged wrongful denial of her supplemental claim. 20th Century demurred on timeliness grounds, relying on the one-year suit provision in plaintiff's policy. The trial court initially sustained the demurrer, but then, based on section 340.9,

it granted reconsideration after entry of judgment and eliminated 20th Century's timeliness defense.

20th Century petitioned the Court of Appeal for writ relief, arguing inter alia that section 340.9 was unconstitutional. The Court of Appeal denied the petition in a published opinion. (App. 1.) The court also denied 20th Century's timely petition for rehearing. (App. 51.) By a four-to-two vote, the California Supreme Court denied 20th Century's petition for review. (App. 57.)

REASONS FOR GRANTING THE PETITION

I. CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 340.9 VIOLATES THE CONTRACT CLAUSE BY VOIDING HUNDREDS OF THOUSANDS OF INSURANCE CONTRACTS AND SETTLEMENT AGREEMENTS.

A. The Contract Clause Prohibits Legislation Impairing Contracts Except Under Narrow, Closely Scrutinized Circumstances.

The Constitution prohibits legislation that impairs contractual obligations. U.S. Const. art. I, § 10, cl. 1. In *The Federalist Papers,* James Madison called the contract clause a "constitutional bulwark in favor of personal security and private rights." The Federalist No. 44, at 301. Accordingly, a statute that retroactively nullifies existing contract rights, "even in the exercise of [the Legislature's] otherwise legitimate police power," ordinarily must fall. *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 242 (1978); *see* 2 Rotunda & Nowak, Treatise on Constitutional Law (3d ed. 1999) § 15.8, at 637, 646.

In an early case discussing the clause, Chief Justice Marshall, writing for the Court, echoed this sentiment when he explained that the Framers included the clause to check "the violent acts which might grow out of the feelings of the moment; and that the people of the United States in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). Thus, a guiding principle in contract clause interpretation is the "necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrassments." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 648 (1819) (majority opinion of Marshall, C.J.). This case involves the destruction of hundreds of thousands of private contracts, based on the "feelings of the moment" and "sudden and strong passions" of one state's legislature.

To evaluate whether legislation unconstitutionally alters parties' contractual commitments, this Court has developed a three-part test. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983). The threshold inquiry is whether the state law operates as a "substantial impairment" of a contractual relationship. *Id.* at 411. The more severe the impairment, the greater the scrutiny to which the legislation will be subjected. *Id.*

Next, if the state law substantially impairs existing contract rights, it must have a significant and legitimate *public* purpose – for example, remedying a broad and general social or economic problem. *Id.* at 411-12; *see* 2 Rotunda & Nowak, Treatise on Constitutional Law, § 15.8, at 655. Once a substantial impairment is found, the significance and legitimacy of the public purpose identified by the Legislature is reviewed strictly, without simply deferring to the Legislature's assessment that a general societal interest is served. *Energy Reserves,* 459 U.S. at 412-13.

Finally, even if there is a significant and legitimate public purpose, the impairment is still unconstitutional if it is not tailored so as to apply only reasonable conditions on the continued vitality of the contract, or if it is not necessary to advance the statute's avowed public purpose. *See id.* at 411-12.

Section 340.9 effects a dramatic impairment of settlements and policy provisions that have been upheld for decades as *advancing* public policy, without any attempt to tailor the impairment to the perceived injustice addressed by the statute.

B. Section 340.9 Substantially Impairs Core Insurance Policy Terms And Voids Settlement Agreements.

1. *Suit limitations provisions are substantive contract provisions protected by the contract clause.* Noting that California's statutory form fire insurance policy contains a one-year suit limitation provision, the appellate court below upheld section 340.9 on the erroneous assumption that the *contractual* suit limitations provision is merely a

required statutory limitations period and thus it can be legislatively amended to the same extent as a *statute* of limitations. But in an opinion overlooked by the appellate court below, this Court has specifically held that an insurance policy's suit limitations clause is *not* the equivalent of a statute of limitations, and thus is not subject to the state's power to retroactively amend such statutes:

> [Cases] in which it was held that a state may lengthen its *statute* of limitations, are not in point. [Citations.] In those cases, the parties had not stipulated a time limit for the enforcement of their obligations. It is true that a state may extend the time within which suit may be brought in its own courts, *if, in doing so, it violates no agreement of the parties*. . . . [But when] the parties have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement of the contract after the time has expired increases their obligation and imposes a burden not contracted for.

Home Ins. Co. v. Dick, 281 U.S. at 408-09 & n.6 (emphasis added). Striking down a statute that purported to nullify a limitations provision in a class of insurance contracts, this Court expressly distinguished *Campbell v. Holt*, 115 U.S. 620 (1885), on which the state court here relied, because "[t]here is a clear difference between the revival of a liability which is unenforceable only because a statute has barred the remedy . . . and the extension of a liability beyond the limit expressly agreed upon by the parties." *Home Ins. Co. v. Dick*, 281 U.S. at 409 n.6. This

Court concluded a legislative attempt to abrogate rights under such a clause was unconstitutional.[2]

Contrary to *Home v. Dick*, the state court opinion here would allow a state legislature freely to alter private standard contract provisions through a two-step process – first by legislatively approving them, and then retroactively eliminating or revising them. As we now explain, that is the device used by the California Legislature in enacting section 340.9.

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[2] Not surprisingly, other courts have held that attempted retroactive impairments of insurance policy limitations periods are unconstitutional. *See, e.g., Weisberg v. Royal Ins. Co. of America*, 124 Ill. App. 3d 864, 869-72, 464 N.E.2d 1170, 1173-75 (1984) (statute tolling contractual limitations period could operate prospectively only); *Farmers' Co-Operative Creamery Co. v. Iowa State Ins. Co.*, 112 Iowa 608, 84 N.W. 904 (1900) (six-month limitations period in fire insurance policy could not be changed by subsequent statute prohibiting contractual limitations period shorter than one year); *Kee v. Shelter Ins.*, 852 S.W.2d 226, 229-30 (Tenn. 1993) (retroactive application of statute extending insurance policy's one-year limitations period violated state constitution's contract clause); *see also Sacks Realty Co., Inc. v. Newark Ins. Co.*, 34 Conn. Supp. 564, 377 A.2d 858 (1992) (change in statutes regarding effect of service of process on statutes of limitations applied only to statutory limitations provisions and not to clauses in insurance contracts); *Mulligan v. Hilton*, 305 Mass. 5, 10, 24 N.E.2d 676, 679 (1940) ("A statute cannot revive a barred cause of action where the time for prosecuting it was fixed by contract"); *cf. Serrano v. Aetna Ins. Co.*, 233 Conn. 437, 450-53, 664 A.2d 279 (1995) (finding a generally applicable statutory amendment, which lengthened a statutorily-dictated policy limitation provision and thus revived time-barred uninsured motorist claims, was an insubstantial impairment of contract).

Nearly a century before passing section 340.9, California followed the lead of other states and endorsed the long-standing practice of insurers to include a limit on the time within which actions on the policy could be instituted. 16 Couch on Insurance (3d ed. 2000) § 235:11, at 235-26; Holmes, Appleman on Insurance (2d ed. 1996) § 1.11, p. 53; *see Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 608 (1947) (stating that insurance contract may shorten statutory limitations period); *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390-91, 19 L. Ed. 257 (1868) (holding contractual limitations provision "valid and enforceable"); *Williams & Bliss v. The Vermont Mutual Fire Ins. Co.*, 20 Vt. 222, 230-31 (1848) (running of contractually prescribed time eliminates all legal liability on the part of the insurer).

Notwithstanding this legislative recognition of suit limitations clauses, however, the clauses remain a contractual, and not a statutory, deadline. "Limitations periods in insurance policies are not 'statutes' of limitation; they are contractual limitations on the insurer's liability." *Great American West, Inc. v. Safeco Ins.*, 277 Cal. Rptr. 349, 352, 226 Cal. App. 3d 1145, 1151 (1991); *see also California Union Ins. Co. v. Poppy Ridge Partners*, 274 Cal. Rptr. 191, 194, 224 Cal.App.3d 897, 903 (1990) (policy's limitation period "is a bargained-for contractual one" and "is more personal than a statutory period of limitations"). These provisions are thus "sufficiently sacred to be protected by the Constitution, which forbids any law to be made impairing contracts." *The North Western Ins. Co. v. The Phoenix Oil & Candle Co.*, 31 Pa. 448 (1858).

Consistent with these authorities, when construing insurance contracts that contain suit limitation provisions

codified in form policies, courts "have consistently focused on the resulting policy provisions – rather than the statutes mandating their inclusion – and have found that the provisions create enforceable contractual limitations periods for bringing suit on an insurance contract." *Wetzel v. Lou Ehlers Cadillac*, 222 F.3d 643, 647-48 (9th Cir. 2000). In fact, "California courts have treated policy [suit limitation] provisions that arise out of the application of [a statutory form policy] as *contractual* limitations periods which operate distinct and apart from the *statutory* limitations period . . . [and t]hese *contractual* limitations periods are thus subject to rules governing the interpretation of contracts." *Id.* at 648.

The state appellate court here improperly departed from these precedents in treating earthquake insurance policies as second-class contracts entitled to little or no constitutional protection.

Continuing its faulty analysis of the nature of a contractual limitations clause, the state court below approved impairment of the clause as affecting a mere remedy, and not a contract right. But the contract clause does not distinguish between provisions in this fashion. If a contract term, even a remedial one, is impaired, the court must then determine if the impairment is necessary to further significant public policy and if the law is narrowly tailored. *Energy Reserves*, 459 U.S. at 411-13. Thus, there is no support for the theory that a term may be impaired if a court finds it dictates contractual remedies rather than contractual duties.

Moreover, a suit limitations provision is a core provision of an insurance policy; it is not simply a remedy for

breach. As hundreds of years of authority explains, suit limitations provisions are at the heart of the insurance contract because they are "bargained-for" and "contractual *limitations on the insurer's liability*," not mere procedural clauses. *Great American West, Inc.*, 277 Cal. Rptr. at 352, 226 Cal. App. 3d at 1151 (emphasis added); *Williams & Bliss*, 20 Vt. at 230-31. Insurers have justifiably relied on the suit provisions' traditionally inviolate contractual protection from stale claims in pricing the premiums for insurance policies covering the Northridge earthquake and in making decisions regarding the amount of reserves necessary to pay claims from the earthquake. *See, e.g., St. Paul Fire & Marine Ins. Co. v. House*, 533 A.2d at 304. As the Seventh Circuit has explained, without the one-year lawsuit limitations provision, insurers "would obviously have demanded a higher premium." *Affiliated FM Ins. v. Bd. of Educ. of Chicago*, 23 F.3d 1261, 1264 (7th Cir. 1994); *see also Travelers v. Budget Rent-A-Car Systems*, 901 F.2d 765, 768-69 (9th Cir. 1990) (increasing uncertainty "raises insurers' costs of doing business; inevitably, those costs are passed on to customers").

The California Supreme Court recently recognized as much in *Vu*, 26 Cal. 4th at 1148, 33 P.3d at 490-91, when it outlined the long history of the contractual suit limitations provision. The court indicated that the Legislature, in enacting a statutory form policy, merely intervened *in favor* of a period of limitation shortened by contract. The published opinion in this case, treating such legislative action as granting a license for states to rewrite parties' contracts, cannot be squared with the contract clause.

We turn now to the constitutional analysis that the state appellate court should have undertaken, but did not due to that court's failure to appreciate the nature of the contract rights at issue.

2. *Section 340.9 substantially impairs insurers' contract rights under the suit limitations provision.* To determine whether insurers' contract rights under the suit limitations provision are impermissibly impaired by section 340.9, we begin with the first *Energy Reserves* factor: the degree of impairment. By reviving lapsed Northridge earthquake claims, section 340.9 grants insureds a new right to claim contract benefits while wiping out the insurers' existing contractual right to repose from stale claims.

This impairment is massive. By one legislative analyst's estimate, as many as 600,000 earthquake claims were made. *See* RJN, tab A, at 55 (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, at 2); tab A, at 41 (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, at 4). Under section 340.9, each of those 600,000 claimants would be entitled to bring another claim against his or her insurer. Moreover, there are countless additional insureds who never submitted a claim but who, under section 340.9, will now be able to present claims as long as they "contacted," however casually, an agent. The potential is astounding. There are already many individual, class, and representative actions pending which involve, by class plaintiffs' counsels' estimate, *tens of thousands* of insureds. And counsel for some of those insureds have already requested that California

trial courts extend the closing date for revived claims to allow even more insureds to file suit.

The cost of investigating these stale claims skyrockets as the feasibility of establishing the cause and amount of alleged earthquake damage plummets with the passage of time. Thus, the revival of claims seven years and more after the event causing the loss will trigger an inordinately costly investigation, often with no feasible means of resolving factual disputes. Insurers will be forced to pay the cost of opening new files where evidence and witnesses are unavailable, and will bear the threat of claims of bad faith for the inability to determine the merit of these stale claims. Thus, *every* new claim, no matter how frivolous or fraudulent, will have settlement value. Because of the expense and settlement value of claims which are impossible to verify, section 340.9 subjects insurers to a form of strict liability for new claims.

Moreover, the effect of destroying the contractual right of repose is not limited to the costs of investigating and settling belated claims. The impairment of contract terms on which insurers had relied when rating and issuing policies also destroys any "relative certainty in estimating loss ratios, establishing reserves and fixing premium rates." *St. Paul Fire & Marine Ins. Co. v. House*, 73 Md. App. 118, 124, 533 A.2d 301, 304 (1987); *see also Landgraf*, 511 U.S. at 265 ("Elementary considerations of fairness dictate that . . . settled expectations should not be lightly disrupted."); *Home Ins. Co. v. Landmark Ins. Co.*, 253 Cal. Rptr. 277, 282, 205 Cal. App. 3d 1388, 1395 (1988) (consistency in application of insurance policy provisions by the courts "promotes certainty in the insurance industry and allows insurers to gauge premiums with greater

accuracy"). Section 340.9 undermines insurers' legitimate business plans for satisfying future claims. *See Allied Structural, supra,* 438 U.S. at 247 ("major unforeseen contingencies" not reflected in insurance company's assessment of likely liability and calculation of premiums "jeopardizes the insurer's solvency and ultimately, the insureds' benefits").

3. *Section 340.9 also substantially impairs settlement contracts.* Section 340.9 goes beyond impairment of insurance policies. To the extent it is construed to revive claims that would otherwise be barred by valid settlement agreements that were not signed by California counsel, Cal. Code Civ. Proc. § 340.9(d)(2) (excluding from revival "[a]ny written compromised settlement agreement . . . where the insured was represented by counsel admitted to the practice of law in California . . . who signed the agreement"), section 340.9 also impairs settlement contracts.

Settlement agreements are protected by the contract clause like any other contractual agreement. *See, e.g., Folsom v. Butte County Assn. of Governments,* 652 P.2d 437, 443-44, 32 Cal. 3d 668, 677 (1982) ("Compromise agreements are, of course, 'governed by the legal principles applicable to contracts generally' "). Further, public policy has long favored the settlement of claims. *McClure v. McClure,* 34 P. 822, 823-24, 100 Cal. 339, 343 (1893); *In re Marriage of Assemi,* 872 P.2d 1190, 1198-99, 7 Cal. 4th 896, 910 (1994).

Section 340.9's impairment of an entire class of favored settlement agreements is total if it negates negotiated contracts whenever an insured – even one represented by counsel – accepted settlement benefits, but California counsel did not sign the settlement agreement. Under that reading of the statute, a great many final settlements would be reopened by section 340.9 – settlements that insurers reasonably believed barred "reopening of the issues settled." *A. J. Industries, Inc. v. Ver Halen*, 142 Cal. Rptr. 383, 388, 75 Cal. App. 3d 751, 759 (1977).

C. The Impairment Is Not Supported By A Significant And Legitimate Public Purpose.

To determine whether section 340.9 is supported by a legitimate public purpose, a court must do more than inquire whether some remedial legislation for insureds might, under certain circumstances, be justified. Under this Court's precedents, the public purpose underlying section 340.9 must be measured against the statute's means for addressing the perceived wrong that led to enactment of the statute.

Applying the appropriate strict review to the question of significant and legitimate public policy, *see Energy Reserves*, 459 U.S. at 412-13, the impairment created by section 340.9 is so extensive that it is not supported by a significant and legitimate public purpose. Instead, it is a product of "the [legislative] feelings of the moment" and "those sudden and strong passions to which men are exposed" against which the contract clause was designed to protect. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) at 87.

While a state legislature has the power to remedy wrongs it has identified, the California Legislature never found that suit limitations, despite their long history of approval, are contrary to public policy. There is thus no legitimate interest in nullifying the provisions except insofar as actually *necessary to cure any misconduct* by insurers who allegedly misled insureds about the "nature and extent of damage to their homes." RJN, tab A, at 33 (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 9, 2000, at 4). But the Legislature never found that the impairment was necessary to cure actual misconduct. At the same time, the public policy in favor of repose is quite strong, "no less important or substantial than" the policy favoring resolution on the merits. *See Vu*, 33 P.3d at 490, 26 Cal.4th at 1149. No public purpose is served by punishing the innocent with the guilty, requiring all to forfeit rights to repose fairly asserted by at least some.

Similarly, if section 340.9 is read to vitiate settlement agreements, that nullification is likewise unsupported by a significant and legitimate public purpose. The legislative history behind section 340.9 contains no finding, and no indication, that settlements were wrongly extracted absent signatures by California attorneys. On the other hand, *upholding* settlement agreements – instead of nullifying them as section 340.9 does – furthers the fundamental public policy in favor of settlement.

For these reasons, the statute is not supported by any legitimate public purpose connected to the perceived wrong that led to its enactment.

D. The Impairment Is Neither Reasonable Nor Necessary.

Even if a legitimate public purpose had been identified by the Legislature as requiring the rewriting of contracts, section 340.9 is not narrowly tailored – it is neither reasonable nor necessary – to the avowed purpose of the statute. The impairment is unreasonable because it is overinclusive rather than crafted to the perceived problem. Proponents of section 340.9 alleged "people who suffered damage to their homes did not receive the benefit of their insurance contracts" when insurers "improperly told [them] that the damage they suffered was below policy deductibles" and then "refused to pay claims [once more damage was discovered] on the basis that the claims were too late." RJN, tab A, at 33 (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 9, 2000, at 4); tab A, at 55 (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, at 2.) But even the proponents did not and could not argue that *every* insurer misled *every* insured, or even that *most* insurers engaged in the alleged conduct. Yet *all* insureds, even those who are not homeowners, are granted rights under section 340.9, rights not linked to compensation, but consisting instead of a windfall designed to punish every insurer through collective guilt, regardless of whether the insurer committed any of the misconduct alleged against some insurers by proponents.

Simply stated, there is a severe disconnect between the purported "crime" and the punishment.

Moreover, the statute grants rights to people and entities who not only were not, but *could* not, have been subjected to the alleged wrongs identified by proponents. An overwhelming number of Northridge earthquake victims who deliberately chose not to pursue policy benefits, or who were fully represented by public adjusters and counsel and were paid fairly negotiated sums long ago, will now benefit from a windfall revival of claims and supplemental claims even though, *by definition, they do not fall within the class of persons allegedly harmed by insurers.*

Absent any requirement that an insured invoking section 340.9 demonstrate his own diligence and/or his insurer's malfeasance, the statute is far too broad and cannot be justified as advancing any public purpose. Reviving *all* time-barred claims *seven* years and more after the event giving rise to the claims benefits an overbroad group of undeserving claimants to the detriment of the vast majority of California insurers and insureds who will pick up the tab. The California Legislature's attempt to punish *all* California insurers for reports of abuse by *some* insurers cannot be reconciled with any legitimate public purpose.

The overbreadth of the statute, and the lack of a sufficient public purpose behind providing a new statutory means for obtaining policy benefits, is demonstrated by the numerous existing remedies for insureds who may have been "misled" into "waiving" their contract rights. The impairment is unnecessary as well as unreasonably overinclusive because existing law already provides mechanisms for equitable extension of the contractual limitations period. As many cases have explained, insureds who may have been "misled" into "waiving"

their contract rights have ample remedies such as common law theories of equitable tolling, estoppel, waiver, and fraud. *See, e.g., Basich v. Allstate Ins. Co*, 105 Cal. Rptr. 2d 153, 87 Cal. App. 4th 1112, 1117 n.5 (2001); *Prudential-LMI Com. Insurance v. Superior Court*, 274 Cal Rptr. 387, 395-99, 51 Cal. 3d 674, 687-93 (1990); *see also Vu*, 33 P.3d at 494, 26 Cal. 4th at 1154; *Forman v. Chicago Title Ins. Co.*, 38 Cal. Rptr. 2d 790, 793-94, 32 Cal. App. 4th 998, 1004 (1995).

Similarly, there is no reasonable necessity for the section 340.9 provisions which could be read to nullify settlements. We note again there is no finding or suggestion of improperly obtained settlements, and even if there were, numerous remedies already exist in contract law to void improper settlements without section 340.9.

II.

SECTION 340.9 VIOLATES DUE PROCESS BY DESTROYING VESTED CONTRACT RIGHTS.

A contractually agreed-upon limitations period creates a *vested substantive right* to repose of stale claims. *See Home Ins. Co. v. Dick*, 281 U.S. at 408-09. Once these contractual time limitations expire, "there is no longer any contractual liability" on which a claim against the insurer can be based, and the insurer has a vested substantive contract right. *See Great American West, Inc.*, 277 Cal. Rptr. at 352, 226 Cal. App. 3d at 1151. Similarly, an executed settlement agreement creates a *vested substantive right* ending litigation. *See generally id.*

A legislative act that removes a substantive, vested right violates due process. *Home Ins. Co. v. Dick, supra,* 281 U.S. at 408-09; *accord Weaver v. Graham,* 450 U.S. 24, 29-30 (1981) (contract and due process clauses protect vested rights). Even where a right is not technically "vested," an act that deprives a party of an important interest may violate due process. *E.g., Morrissey v. Brewer,* 408 U.S. 471, 481 (1972) ("this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege' " and instead looks to "the extent to which an individual will be 'condemned to suffer grievous loss' "); *Bell v. Burson,* 402 U.S. 535, 539 (1971); *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168 (1951).

Those rights may not be abrogated retroactively by a legislature. *See* Couch on Insurance (3d ed. 2000) § 235:4, at 235-17 through 235-18 ("contract limitations of time for bringing suit [even if] to a shorter period than that prescribed by statutes of limitation are, if reasonable, entitled to the constitutional protection of the Fourteenth Amendment"). In fact, in his Commentaries on the Constitution, Justice Story stated: "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891). Therefore, as this Court recently explained, "[r]etroactivity is generally disfavored in the law," and "for centuries our law has harbored a singular distrust of retroactive statutes." *Eastern Enterprises,* 524 U.S. at 532, 547 (plurality opn. of O'Connor, J. and concurring and dissenting opn. of Kennedy, J.)

This distrust "recogni[zes] that retroactive lawmaking is a particular concern for the courts because of the legislative 'tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals.' " *Eastern Enterprises*, 524 U.S. at 548 (Kennedy, J., concurring and dissenting) (quoting *Landgraf*, 511 U.S. at 266.) In language particularly appropriate here, Justice Kennedy has explained that the constitutional guarantee of due process must guard against retroactive legislation, such as section 340.9, that "change[s] the legal consequences of transactions long closed":

> "[D]ue process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation."

Id. at 548-49 (Kennedy, J., concurring and dissenting).

Section 340.9 cannot be reconciled with these rules. It unconstitutionally eliminates a vested right not to be sued and destroys settled expectations based on "transactions long closed."

III.

SECTION 340.9 VIOLATES THE EX POST FACTO CLAUSE BY RETROACTIVELY ELIMINATING CONTRACT RIGHTS WITHOUT NOTICE AND NECESSARY FINDINGS.

This Court has explained that "[o]ur Constitution expresses concern with retroactive laws through several of its provisions, including the *Ex Post Facto*" clause. *Eastern Enterprises*, 524 U.S. at 533. While an early decision of this Court limited that clause to the criminal context, *see Calder v. Bull*, 3 U.S. (3 Dall.) at 386, nothing in the clause or the Constitution requires such a limit. Indeed, as Justice Thomas recently stated: "the Ex Post Facto Clause of the Constitution, Art. I, § 9, cl. 3, even more clearly [than the Takings Clause] reflects the principle that '[r]etrospective laws are, indeed, generally unjust.' " (*Eastern Enterprises*, 524 U.S. at 538 (quoting 2 J. Story, Commentaries, § 1398, at 272). Justice Thomas explained that, "[i]n an appropriate case, therefore, [he] would be willing to reconsider *Calder* and its progeny to determine whether a retroactive civil law . . . is nonetheless unconstitutional under the *Ex Post Facto* Clause." *Id.* at 539.

This is an appropriate case for the Court to reconsider *Calder* and rule that, when a state legislature retroactively eliminates vested rights in 600,000 contracts or more, with no finding of misconduct by the contracting parties, nor of necessity for the statute, the act violates the ex post facto clause.

CONCLUSION

Section 340.9's negative impact threatens to extend beyond the insurance industry to the country's entire business environment. Approving such a profoundly expansive governmental intrusion into private contractual obligations, years after the fact, must gravely concern banks, manufacturers, landlords, and others who depend on contractual business relations. For this reason, and all of the reasons discussed above, this Court should grant the petition.

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

20TH CENTURY INSURANCE COMPANY, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent. LINDA P. AHLES, Real Party In Interest.	B147464 (Los Angeles County Super. Ct. No. BC215771) (Filed Jul. 24, 2001)

Petition for Writ of Mandate. Paul Gurman, Judge. Petition denied.

Horvitz & Levy, Lisa J. Perrochet and David S. Ettinger; Even, Crandall, Wade, Lowe & Gates, James L. Crandall and Michael J. McGuire for Petitioner.

No appearance for Respondent.

Dale E. Washington for Real Party in Interest.

Shernoff, Bidart, & Darras, William M. Shernoff, Michael J. Bidart and Jeffrey Isaac Ehrlich for Consumer Attorneys of California, United Policyholders, Consumer Federation of California, Congress of California Seniors,

Foundation for Taxpayer and Consumer Rights, and California Public Interest Research Group as Amicus Curiae on behalf of Real Party in Interest Linda Ahles.

Quisenberry & Kabateck, Brian S. Kabateck, Suzanne Havens Beckman and Heather M. Mason for Consumer Attorneys of California, United Policyholders, Consumer Federation of California, Congress of California Seniors, Foundation for Taxpayer and Consumer Rights, and California Public Interest Research Group as Amicus Curiae on behalf of Real Party in Interest Linda Ahles.

The petitioner, 20th Century Insurance Company, seeks a writ of mandate directing the trial court to vacate and set aside an order granting the motion of the real party in interest, Linda P. Ahles, to reconsider an earlier order sustaining a demurrer to Ahles' complaint without leave to amend.[1]

Ahles had filed a complaint against 20th Century for breach of a contract of insurance, tortious breach of the implied covenant of good faith and fair dealing (bad faith) and fraud. The trial court's ruling, which allowed her to go forward with her action and required 20th Century to file an answer, was based on the Legislature's

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[1] Following the trial court's order sustaining the demurrer, a judgment of dismissal was signed and filed on October 3, 2000. As we explain below, we elect to treat Ahles' motion to reconsider the order sustaining the demurrer as a motion for a new trial.

enactment of Code of Civil Procedure, section 340.9 (hereafter, section 340.9).[2] This new statute, which became effective on January 1, 2001, revives, subject to certain conditions and limitations, insurance claims *"arising out of* the Northridge earthquake of 1994" that previously had been barred by "the applicable *statute* of limitations." (Italics added.)

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[2] Code of Civil Procedure, section 340.9 provides:

"(a) Notwithstanding any other provision of law or contract, any insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of the effective date of this section solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of the effective date of this section. This subdivision shall only apply to cases in which an insured contacted an insurer or an insurer's representative prior to January 1, 2000, regarding potential Northridge earthquake damage.

"(b) Any action pursuant to this section commenced prior to, or within one year from, the effective date of this section shall not be barred based upon this limitations period.

"(c) Nothing in this section shall be construed to alter the applicable limitations period of an action that is not time barred as of the effective date of this section.

"(d) This section shall not apply to either of the following:

"(1) Any claim that has been litigated to finality in any court of competent jurisdiction prior to the effective date of this section.

"(2) Any written compromised settlement agreement which has been made between an insurer its insured where the insured was represented by counsel admitted to the practice of law in California at the time of the settlement, and who signed the agreement."

The trial court's application of section 340.9 to restore legal vitality to Ahles' complaint raises a number of important questions which we must address. After a review of this record, the legislative history of section 340.9, including the significant public policies it seeks to serve, and the relevant case law, we are persuaded that the new statute (1) does not impermissibly impair 20th Century's right of contract or deny it substantive due process by the destruction of vested contract rights, (2) embraces and applies to the 12-month "contractual" limitations period included in 20th Century's policy as mandated by Insurance Code section 2071, (3) applies to all cases "pending" on the date the statute became effective, and (4) extends to Ahles' tort claim for bad faith, as well as her breach of contract cause of action.[3] In view of these conclusions, we will affirm the trial court's order of December 5, 2000, and deny 20th Century's writ petition.

FACTUAL AND PROCEDURAL BACKGROUND[4]

On January 17, 1994, Ahles was the owner of the residential property at 10727 Garfield Avenue in Culver City, California. She had a homeowner's insurance policy issued by 20th Century (policy no. H07066432) which

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[3] As we explain below, it does *not* extend to Ahles' fraud cause of action.

[4] As 20th Century's challenge to Ahles' complaint was by demurrer, the facts we recite are taken from her second amended complaint, which we necessarily must accept as true. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 579.) Her second amended complaint is the operative pleading before us. The procedural matters reflected in the appellate record are not in dispute.

included, by endorsement, coverage for loss and damage caused by earthquake. The policy covered her home and other structures on the property. On January 17, a large earthquake, commonly known as the "Northridge earthquake," struck southern California and caused extensive damage.

On or about May 1, 1994, Ahles reported to 20th Century that she had observed damage to her property which she believed was attributable to the Northridge earthquake. Three weeks later, 20th Century sent an adjuster to inspect the property and evaluate the damage. In July, 20th Century sent an engineer to further inspect the property, including Ahles' attic and the crawl space underneath her home. Based on those inspections, 20th Century determined the amount of damage to Ahles' home was less than the amount of her $11,100 deductible. It therefore made no payment to her for that damage.[5]

Approximately four years later, on August 27, 1998, Ahles had her home inspected for termites. According to Ahles' allegations, the termite inspector observed earthquake damage in the crawl space under her house. On or about September 15, 1998, she filed a supplemental claim for earthquake damage with 20th Century. In that claim, Ahles asserted that her home had sustained earthquake damage that had neither been discovered nor considered during 20th Century's adjustment of her original claim. Almost one year later, on July 15, 1999, 20th Century sent

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[5] The deductible which pertained to the other structures on her property, however, was a lesser amount ($1,110) and, since the damage to those structures exceeded that amount, 20th Century did pay Ahles $5,030.11 under the policy.

an adjuster to inspect Ahles' home and to investigate her new claim. The adjuster concluded that the damage claimed by Ahles was not caused by the earthquake. On that ground, and because Ahles had submitted her supplemental claim more than four years after the earthquake and the adjustment on her initial claim, 20th Century denied it. Ahles responded to this denial on August 26, 1999, by filing a complaint against 20th Century, alleging breach of contract and breach of the implied covenant of good faith and fair dealing.

20th Century then sent engineers to inspect Ahles' house on October 26, 1999. The engineer's report apparently acknowledged that Ahles' home had sustained considerable damage, but blamed it on causes other than the earthquake. The report, however, also noted that the initial engineer's report had been incomplete in that it had failed to identify damage to the foundation and stucco, as well as other "non-earthquake" problems.

At proceedings held on March 23, 2000, the trial court sustained 20th Century's demurrer, but granted Ahles leave to amend her complaint. She did so, and added as an allegation in her first amended complaint a cause of action for fraud. When 20th Century again successfully demurred, Ahles was once more granted leave to amend.

After Ahles filed her second amended complaint on July 17, 2000, 20th Century again demurred. As one ground, 20th Century argued that Ahles' "entire action [was] barred by the one-year statute of limitations contained in the insurance policy." 20th Century's policy issued to Ahles contained a provision stating that "[n]o action shall be brought unless there has been compliance

with the policy provisions and *the action is started within one year after the occurrence causing the loss or damage."* (Italics added.) 20th Century contended, pursuant to this clause, that Ahles had only one year from denial of her 1994 claim to file suit. Her entire action was therefore untimely.

In response, Ahles asserted that in 1994 she was assured by three different 20th Century representatives that there had been no structural damage to her home and that if she discovered damage which exceeded her deductible, she could re-open her claim.[6] Ahles argued

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[6] On August 17, 1994, approximately three months after Ahles filed her claim, 20th Century sent her a letter explaining that the damage to her home did not exceed her $11,100 deductible and therefore nothing was due on that part of her claim. The letter, however, also stated: "If you discover that your damages exceed the relevant deductible(s), please advise us and we will reconsider your claim." The letter did *not* contain or suggest an expiration date.

In addition, Ahles alleges that, "20th Century also made general announcements which encouraged insureds to not deluge them with claims. On or about the end of January 1994, defendant 20th Century widely disseminated a letter to its insureds and the general populace regarding common questions asked concerning earthquake coverage. This letter indicated that if damage to an insured's property appeared cosmetic only but was later discovered to be more severe that 20th Century should be called only at that time. The letter further indicated that anytime additional damage was discovered that 20th Century should be contacted and the claim would be reopened to see if a supplemental damage payment [was] warranted. The letter further indicated that 20th Century would pay for inspections to make certain the property was safe to live in. Finally, concerning 'formalizing' a claim the letter indicated that 20th Century would let its insureds know anything that was

she reasonably relied on these representations and, in 1998, when the termite inspector informed her of the damage under her house, Ahles believed she could make a claim. Ahles further alleged that "20th Century's claims handling practices were improper, so much so that the Department of Insurance audit . . . found 75% of the Northridge earthquake claims were mishandled." Finally, Ahles alleged 20th Century had been guilty of bad faith and fraud in that it knowingly "lowball[ed]," mishandled and improperly denied hers and numerous other claims pertaining to the Northridge earthquake. Under these circumstances, she contended, 20th Century waived and was estopped from asserting the one year statute of limitations.[7]

At the hearing held on September 29, 2000, following which the trial court sustained 20th Century's demurrer

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needed, but they wanted to keep the process as simple as possible." (The record, however, does not contain a copy of this letter.)

[7] These allegations raise another issue which we do not have to reach in light of our focus on the impact of Code of Civil Procedure section 340.9: "Where an insured presents a timely claim to his insurer for property damage under a policy, and the insurer's agent inspects the property but does not discover the full extent of covered damage, does California Insurance Code section 2071 [and its one year limitations period used in all relevant insurance contracts, including 20th Century's,] bar a claim brought by the insured more than one year after the damage was sustained but within one year of his [or her] discovery of the additional damage?" (*Vu v. Prudential Property & Casualty Ins. Co.* (9th Cir. 1999) 172 F.3d 725, 727 [certifying this issue to the California Supreme Court; such certification was accepted and the issue is now pending before that court (No. S078271)].)

to her second amended complaint without leave to amend, Ahles asked the court to take judicial notice of SB No. 1899, a bill which had been passed by the California Legislature and was then awaiting the Governor's signature. The bill had been drafted to add section 340.9 to the Code of Civil Procedure. (See fn. 2, *ante.*)

The trial court, recognizing that the Governor had not yet signed the bill, indicated the case was therefore controlled by the one year limitations period in the insurance contract. Ahles had timely filed her 1994 claim and, although she argued her claim of delayed discovery of further earthquake damage was excusable, the court indicated that it was "not persuaded that the delay was justified." The trial court held that Ahles' complaint was time barred and sustained 20th Century's demurrer without leave to amend. In concluding the proceedings, however, the trial court stated, "And of course, . . . if the Governor signs a bill that is enacted into law, that is a ground for reconsideration under 1008 of the Code of Civil Procedure."[8]

According to 20th Century, it served notice of the trial court's ruling sustaining its demurrer without leave to amend and entering a judgment of dismissal on October 3, 2000. Ahles, however, asserts 20th Century never served her with a signed, file-stamped copy of the dismissal. The only copies received by Ahles were "blank."[9]

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[8] The following day, September 30, 2000, the Governor signed SB 1899 into law. It became effective on January 1, 2001.

[9] In its petition, 20th Century acknowledges that "it is possible that what was served was only the proposed judgment before it was signed and filed." In view of that concession, and

On November 28, 2000, 56 days after the judgment of dismissal, Ahles made an ex parte application for a special setting of a motion for reconsideration of the trial court's October 3, 2000, ruling and "to vacate" that decision. Ahles indicated that "unknown to . . . counsel and the court, the law [SB 1899] had. . . . been signed into law on September 30, 2000." Ahles brought the motion for reconsideration and to vacate judgment "based upon [the] new law."

On December 5, 2000, following a hearing, the trial court granted Ahles' motion for reconsideration pursuant to the provisions of Code of Civil Procedure, section 1008, subdivision (c).[10] When 20th Century argued that SB 1899 would not be in effect until January of 2001, the court stated, "I'll put it over to January . . . , conditionally granting the motion and overruling the demurrer on the

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in view of the trial court's implied finding (by virtue of its subsequent ruling) that such service had not been made, we conclude that 20th Century did not serve a completed copy of the judgment of dismissal dated October 3, 2000, until December 29, 2000. In its petition, 20th Century states that it served on Ahles a signed and file stamped copy of the October 3, 2000 judgment of dismissal of Ahles' second amended complaint on December 29, 2000. The exhibit provided by 20th Century includes a "Notice of Entry of Judgment of Dismissal" bearing a January 2, 2001 superior court file stamp. In its petition, 20th Century indicates the copy of the dismissal was provided "as a precaution in the event a file-stamped copy of the judgment had not earlier been served."

[10] Code of Civil Procedure, section 1008, subdivision (c), provides: "If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order."

statute of limitations ground, unless prior to January . . . 2001, that law is in some way effectively altered by way of amendment, . . . or whatever other statutory or constitutional[ ] event may occur to nullify that law." The court set dates for hearings, a status conference and trial. Before the end of the hearing, counsel for 20th Century stated, "A point of clarification, your honor. As I understand, the court's ruling is reviving the second amended complaint *in total*. . . . " (Italics added.) The trial court responded, "Yes."

20th Century's response to this ruling was to file the within petition seeking writ relief. It argues (both in its petition and in a subsequent brief filed in response to amicus briefing) that the trial court had no jurisdiction to grant reconsideration because (1) Ahles' application was not timely, (2) a judgment had been entered and (3) the time for appeal therefrom had expired. 20th Century also contends that the trial court's basis for granting relief to Ahles was flawed in that SB 1899 (§ 340.9) (1) did not become law until *after* the trial court had ruled and thus could not serve as a basis for the court's ruling, (2) did not apply since Ahles' claim had already been "litigated to finality," (3) is unconstitutional as an impermissible impairment of contract and constitutes destruction of "vested" contract rights in violation of the due process clause and, in any event, (4) does not apply to *tort* claims asserted by an insured.

On February 28, 2001, we stayed all further proceedings in the trial court, issued an order to show cause and set the matter on calendar.

DISCUSSION

Before turning to the critical questions concerning the proper construction, application and constitutional vitality of section 340.9, we must first address 20th century's jurisdictional arguments.

1. *The Trial Court Had Jurisdiction To Consider And Rule Upon Ahles' Motion To Reconsider And To Vacate The Court's Order of September 29, 2000, And The Judgment of October 3, 2000*

    a. *Trial Court's Grant of Reconsideration After Entry of Judgment*

20th Century first argues the trial court had no jurisdiction to grant Ahles' motion for reconsideration because judgment had been entered in the matter on October 3, 2000. 20th Century contends that, once a final judgment has been entered, a motion for reconsideration may not be entertained. In making this argument, 20th Century relies on the court's decision in *APRI Ins. v. Superior Court* (1999) 76 Cal.App.4th 176. In *APRI,* the trial court signed an order granting a motion to quash and dismissing APRI from the action. It then granted a motion for reconsideration of the ruling on the motion to quash. APRI contended this was error and the appellate court agreed. The matter had been dismissed within the meaning of Code of Civil Procedure section 581d.[11] Once

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[11] Code of Civil Procedure section 581d provides: "A written dismissal of an action shall be entered in the clerk's register and is effective for all purposes when so entered. [¶] All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective

the dismissal was entered, the trial court had no jurisdiction to reconsider the motion to quash. The *APRI* court stated, "The trial court failed to observe the critical distinction between an order of dismissal, which is a judgment, and other orders. 'A court may reconsider its order granting or denying a motion and may even reconsider or alter its judgment so long as judgment has not yet been entered. Once judgment has been entered, however, the trial court may not reconsider it and loses its unrestricted power to change the judgment. It may correct judicial error only through certain limited procedures such as motions for new trial and motions to vacate the judgment. [Citations.]' " (*Id.* at p. 181.) Here, 20th Century has provided a copy of a judgment of dismissal bearing an October 3, 2000 Superior Court file stamp and the trial judge's signature.[12] Since it appears a final (i.e., appealable) judgment had been entered, we conclude the trial court could not grant Ahles' motion for reconsideration.

The trial court, however, could have properly granted a motion for a new trial and, under certain circumstances, a motion to reconsider may be construed as one for a new trial. In *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, the appellant argued that his motion for reconsideration should have been construed as a motion for a new trial or to vacate the judgment for purposes of determining when the time to file a notice of appeal had

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for all purposes, and the clerk shall note those judgments in the register of actions in the case."

[12] 20th Century has not provided a copy of the Civil Register Report for the case indicating the judgment of dismissal was entered.

begun to run. The appellate court determined it was "compelled to treat the motion for reconsideration as a motion for new trial" because two of its prior decisions had indicated such a procedure was appropriate. (*Id.* at p. 1610.) The court stated, "Because of those decisions, we believe that good cause exists and fairness requires us to construe plaintiff's motion for reconsideration in this case to be a motion for new trial or a motion to vacate the judgment. . . . " (*Ibid.*) Although the *Passavanti* court indicated that, absent a showing of "extremely good cause," it was "disinclined to engage in the practice of 'construing' motions and [would] hold counsel to the label they attach to their motions," it concluded such good cause had been shown. (*Ibid.*)

In the present case, Ahles designated her motion as one for "reconsideration and to *vacate* the decision of 10/3/00." (Italics added.) However, as 20th Century has pointed out, a motion to vacate a judgment pursuant to Code of Civil Procedure section 663 " ' . . . does not contemplate merely the setting aside of the judgment, as does a motion for new trial or a motion for relief from default under C.C.P. 473. It expressly provides for *vacating the judgment and entering of another judgment.* Hence an order of vacation, without directing entry of a new judgment, is void.' " (*Ramirez v. Moran* (1988) 201 Cal.App.3d 431, 435, original italics.) Here, the trial court granted Ahles' motion, but failed to enter a new judgment. Moreover, under the circumstances presented, it would have been inappropriate to do so.

Although Ahles labeled her motion as one for reconsideration or to vacate the trial court's judgment of October 3, 2000, Ahles purpose in making the motion was to

restore the action to the trial court's calendar. In essence, Ahles made a motion for a new trial pursuant to Code of Civil Procedure, section 657. Under that section, a "verdict may be vacated and *any other decision may be modified or vacated,* in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] . . . [¶] 7. Error in law, occurring at the trial and excepted to by the party making the application." (Italics added.) Here, it is arguable the trial court's decision (or entry of judgment) was based on an incorrect or erroneous understanding of the law; the court apparently believed it had the right to reconsider its October 3rd ruling granting 20th Century's demurrer without leave to amend. In addition, the trial court could arguably have relied on the pendency of SB 1899 to at least continue the matter until the statute became effective. (See § 340.9, subd. (b).)

We note that Ahles may properly bring a motion for new trial from a judgment of dismissal resulting from the sustaining of a demurrer. (*Carney v. Simmonds* (1957) 49 Cal.2d 84, 88; 90-91; see *Finnie v. District No. 1 – Pacific Coast Dist. Etc. Assn.* (1992) 9 Cal.App.4th 1311, 1315-1316.) Further, when treated as a motion for new trial, Ahles' motion is timely.[13]

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[13] Code of Civil Procedure, section 659 provides in relevant part: "The party intending to move for a new trial must file with the clerk and serve upon each adverse party a notice of his intention to move for a new trial, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court or both, either

Although we are, as was the court in *Passavanti*, generally disinclined to construe a motion as other than that which it has been labeled, "extremely good cause" exists for treating Ahles' motion as one for a new trial. (*Passavanti v. Williams, supra,* 225 Cal.App.3d at p. 1610.) At the proceedings held on September 29, 2000, after the trial court determined Ahles complaint was time barred, it specifically stated that, should the Governor sign SB 1899, "that [would be] a ground for reconsideration under 1008 of the Code of Civil Procedure." Notions of fairness indicate Ahles should be allowed to pursue her claim in view of the trial court's attitude and comments regarding the case; the trial court *invited* Ahles to make a motion for reconsideration if and when the Governor signed SB 1899. This invitation indicates the trial court considered its ruling to be subject to later modification. (Cf. *APRI Ins. v. Superior Court, supra,* 76 Cal.App.4th at p. 185 [nothing in the record indicated the trial court's dismissal entered in favor of APRI was intended to be *without* prejudice].)

[¶] 1. Before the entry of judgment; or [¶] 2. Within 15 days of the date of mailing of entry of judgment by the clerk of the court . . . , or service upon him by any party of written notice of entry of judgment, or within 180 days after the entry of judgment. . . . [¶] Said notice of intention to move for a new trial shall be deemed to be a motion for a new trial on all the grounds stated in the notice." Here, there is no evidence notice of entry of the judgement was given by the court clerk and 20th Century has failed to show it served on Ahles a file stamped copy of the October 3, 2000, judgment prior to December 29, 2000. Accordingly, Ahles' motion (or notice of motion), filed on November 28, 2000, was well within the 180 day time limit.

Finally, had the trial court neither invited nor granted Ahles' motion, it is clear from the record before us that Ahles would have filed a notice of appeal from the October 3, 2000 judgment. Had she done so, we would have had to consider, given the retroactive provisions of Code of Civil Procedure section 340.9, subdivision (b) (see fn. 2, *ante*), the present questions by way of appeal. Instead, since the trial court's order necessarily precluded the filing of a notice of appeal, we may properly consider the issues raised by way of 20th Century's petition for a writ. The result of this case, however, will be no different simply because we review the matter on a writ rather than on appeal.

b. *California Rules of Court, rule 2(a)*

20th Century next argues that, if notice of the judgment was served on October 3, 2000, then December 4 was the last day to file a notice of appeal and the last day the trial court had jurisdiction to grant any motion Ahles' might have brought. "[W]hen a judgment becomes final by lapse of the time for appeal, the court [generally] has no further jurisdiction of the subject matter. . . . " (*Mason & Associates, Inc. v. Guarantee Sav. & Loan Assoc.* (1969) 269 Cal.App.2d 132, 133.) Accordingly, 20th Century argues, pursuant to California Rules of Court, rule 2(a), the trial court lacked jurisdiction to hear the motion on December 5, 2000.

California Rules of Court, rule 2(a) provides in relevant part: "Except as otherwise provided by Code of Civil Procedure section 870 or other statute or rule 3, a notice of appeal from a judgment shall be filed on or before the

earliest of the following dates: (1) 60 days after the date of mailing by the clerk of the court of a document entitled 'notice of entry' of judgment; (2) 60 days after the date of service of a document entitled 'notice of entry' of judgment by any party upon the party filing the notice of appeal, or by the party filing the notice of appeal; or (3) *180 days after the date of entry of the judgment.*" (Italics added.)

As we have already noted (see fn. 9, *ante*), 20th Century has failed to establish that it served on Ahles a copy of the notice of entry of judgment before December 29, 2000, and there is no evidence in the exhibits to indicate the clerk mailed a copy of the notice of entry of judgment. Under these circumstances, the trial court had jurisdiction to consider Ahles' motion up to 180 days after October 3, 2000.[14]

2. *Section § 340.9 Justified The Trial Court's Order*

a. *The Legislature's Power to Revive Barred Claims*

We begin our consideration of 20th Century's attack on section 340.9 by recognizing a well established principle of law. The Legislature is constitutionally free to revive a civil cause of action that has become time barred under a former statute of limitations. (*Campbell v. Holt* (1885) 115 U.S. 620, 629-630 [a law removing the bar of a

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[14] 20th Century's final procedural argument, based on the contention that Ahles' motion for consideration was not timely under Code of Civil Procedure, section 1008, subdivision (a), is moot in light of our determination to treat her motion as one for a new trial.

statutory limitations defense *after* it has been perfected is not unconstitutional]; see also *Chase Securities Corp. v. Donaldson* (1945) 325 U.S. 304, 315 [reaffirming *Campbell v. Holt*].)[15]

This is also the rule in California. "[T]he Legislature has the power to expressly revive time-barred civil common-law causes of action." (*Liebig v. Superior Court* (1989) 209 Cal.App.3d 828, 835 (*Liebig*) [rejecting a challenge to Code of Civil Procedure, section 340.1, which expressly revived time-barred tort claims of victims of sexual molestation]; see also *Tietge v. Western Province of the Servites, Inc.* (1997) 55 Cal.App.4th 382, 386 (*Tietge*) ["[W]e find no constitutional impediment to the revival of a personal cause of action. . . . "]; *Lent v. Doe* (1995) 40 Cal.App.4th 1177, 1184 (*Lent*) [rejecting the contention that *Liebig* was decided incorrectly and should not be followed].)[16]

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[15] In *Chase*, the Supreme Court rejected a constitutional challenge to an amendment to the Minnesota Blue Sky laws that operated to abolish the defendant's statute of limitations defense in pending litigation. Justice Jackson, writing for a unanimous court, acknowledged that when the litigation against it was commenced, the defendant had a legitimate expectation that it could defend the claim by invoking the relevant statute of limitations, and that this expectation had been disappointed by the change in the law. This disappointment, however, did not rise to the level of a constitutional violation because "[w]hatever grievance appellant may have at the change of policy to its disadvantage, it had acquired no immunity from this suit that has become a federal constitutional right." (*Chase Securities Corp. v. Donaldson, supra*, 325 U.S. at p. 314.)

[16] The Supreme Court denied review of *Liebig*, *Tietge* and *Lent*.

In *People v. Frazer* (1999) 21 Cal.4th 737, the Supreme Court signaled its adoption of the reasoning in *Chase Securities Corp. v. Donaldson, supra,* 325 U.S. 304. In a case which rejected a due process challenge to a statute that retroactively extended the criminal statute of limitations for certain sex crimes, the *Frazer* court stated: "The holding of *Chase* – that no constitutionally protected interest arises once a statute of limitations has run, and that such protection can be retroactively withdrawn consistent with due process – has been reaffirmed by the high court in subsequent cases. (See *Plaut v. Spendthrift Farm, Inc.* (1995) 514 U.S. 211, 229 [noting that statutes of limitation 'can be extended, without violating the Due Process Clause, after the cause of action arose and even after the statute itself has expired']; *Electrical Workers v. Robbins & Myers, Inc.* (1976) 429 U.S. 229, 243 [rejecting the claim that 'Congress was without constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period']." (*People v. Frazer, supra,* 21 Cal.4th at pp. 768-769.)

Given this history, it is clear that the decisions in *Liebig, Tietge* and *Lent* represent current California law on this issue. It is also clear that it is the Legislature, not the courts, which is the proper forum for resolving the competing policy interests involved in the decision to revive a time barred claim. (*Tietge, supra,* 55 Cal.App.4th at p. 388; *Lent, supra,* 40 Cal.App.4th at pp. 1186-1187.)[17]

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[17] This may be, at least in part, the reason for the Supreme Court's rejection, on November 29, 2000, of a petition filed by an insurance industry coalition to enjoin the operation of section 340.9 and its then pending effective date of January 1, 2001. The

b. *Public Policy Considerations In The Enactment of Code of Civil Procedure Section 340.9*

In the instance of section 340.9, the Legislature has chosen to extend the limitation period available to insureds to file a lawsuit "*[n]otwithstanding any other provision of law or contract,* [for] any insurance claim for damages *arising out of* the Northridge earthquake of 1994." (Italics added.) Claims as to which the applicable statute of limitations had expired were revived for a one-year period commencing on the effective date of the statute. "Any action pursuant to this section commenced *prior to,* or within one year from, the effective date of this section shall not be barred based upon [the expired] limitations period." (§ 340.9, subd. (b).)

This statute is subject to three limitations: (1) the insured must have contacted the insurer or its representative about "potential Northridge earthquake damage" prior to January 1, 2000 (§ 340.9, subd. (a)); (2) the statute will *not* apply to claims which have been "litigated to finality" in "any court of competent jurisdiction" (§ 340.9, subd. (d)(1)); and (3) the statute will not apply to any claim which has been resolved by a *written* settlement agreement, provided the insured was represented by an attorney admitted to practice in California at the time of

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court was apparently not persuaded by the argument that the revival of claims of an insured who had actually settled with an insurer prior to January 1, 2001, but where the settlement agreement had *not* been signed by the insured's counsel (see Code Civ. Proc., § 340.9, subd. (d)(2)), would impermissibly reopen settled matters.

the settlement and said attorney *"signed the agreement."* (§ 340.9, subd. (d)(2), italics added.)

1. *Public Policy Considerations*

It is important to our later discussion of the constitutional issues raised by 20th century to recognize and appreciate the serious public policy considerations that were involved in the enactment of section 340.9. "Whenever a state determines, in good faith, that a practice of an industry is injurious to the public, the state may control the practice even where the legislation directly affects the internal affairs of a business or industry, as long as the legislation is neither arbitrary nor discriminatory." (*Cal. State Auto. Etc. Bureau v. Downey* (1950) 96 Cal.App.2d 876, 894.) The business of insurance is " 'clothed with a public interest,' and therefore subject 'to be controlled by the public for the common good.' " (*German Alliance Ins. Co. v. Kansas* (1914) 233 U.S. 389, 415.)[18] Especially in California, the insurance industry "is a highly regulated industry." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 830.)[19]

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[18] See also 15 United States Code section 1011 (McCarron Ferguson Act), which declares *state* regulation of the business of insurance to be in the public interest.

[19] The California Legislature regulates almost every aspect of the business of insurance, such as which insurers are admitted to transact business (Ins.Code, § 700), how policies may be canceled or renewed (Ins.Code, §§ 675-679), the insurers' permissible investments (Ins. Code, §§ 1100-1107, 1152-1254), the rates the insurers may charge (Ins. Code, §§ 1861.01-1861.16), acts of the insured excluded from coverage under the policy (Ins. Code, § 533), the insurers' trade and

The field of insurance so greatly affects the public interest that the industry is viewed as a "quasi-public" business, in which the special relationship between the insurers and insureds requires special considerations. " *'The insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature.* Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . [A]s a supplier of a public service

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claims adjustment practices (Ins. Code, §§ 790-790.15), incontestability clauses in life (Ins. Code, §§ 1013.5 and 10206) and disability (Ins. Code, § 10350.2) policies; disclosure requirements for binding arbitration provisions in disability policies (Ins. Code, § 10123.19), and the actual provisions of the policy (see e.g., Ins. Code, §§ 2070-2071, 11580-11589.5). Applicable statutes are deemed part of the policy even if not specifically mentioned in the insurance contract. (*Wildman v. Government Employees' Ins. Co.* (1957) 48 Cal.2d 31, 40.)

More specifically, the Legislature has enacted many statutes, the sole purpose of which is to provide various types of relief to Northridge earthquake victims. See, for example, Insurance Code section 10089.70 (directing Department of Insurance to establish a program for the mediation of disputes between insureds and their insurers arising out of the Northridge earthquake, and any later earthquakes); Revenue and Tax Code section 19132.5, subdivision (a) (exempting victims of Northridge earthquake from certain tax penalties); Revenue and Tax Code section 69, subdivision (a) (allowing a longer period for transfer of base-year value to comparable property for victims of Northridge earthquake than victims of other disasters); Education Code section 67359.20 (appropriating $75 million in bond funds for repair and replacement of buildings for the University of California, the California State University, and California Community Colleges arising out of Northridge earthquake).

rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust.' " (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820, italics added.)

The *Egan* court recognized that the unequal relationship between the insured and insurers demanded special remedies for breach of that public trust, such as tort remedies for the failure to perform obligations promised in a policy and punitive damages. The court explained: "[T]he relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position. The availability of punitive damages is thus compatible with recognition of insurers' underlying public obligations and reflects an attempt to restore balance in the contractual relationship." (*Id.* at p. 820.)

The significant public interest in the special relationship between the insured and insurer justifies the availability of tort remedies, and distinguishes insurance contracts from other types of contracts. Tort remedies remain unavailable in non-insurance contract cases. (See e.g., *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 46 [availability of tort remedies for breach of the covenant of good faith and fair dealing not extended to non-insurance contracts since "the insurance policy cases represent 'a major departure from traditional principles of contract law' "]; *Foley v. Interactive Data Corp.*

(1988) 47 Cal.3d 654 [tort remedies not permitted for breach of the implied covenant of good faith and fair dealing in employment contract cases].)

Similarly, the public's interest in protecting vulnerable insureds mandates that insurance contract interpretation, like insurance contract remedies, not be limited by the usual contract rules: "the rights and obligations of the insurer cannot be determined solely on the basis of rules pertaining to private contracts negotiated by individual parties of relatively equal bargaining strength." (*Barrera v. State Farm Mut. Automobile Ins. Co.* (1969) 71 Cal.2d 659, 669.)[20] Rather, statutes pertaining to, and contractual provisions contained within, insurance policies must be construed in light of applicable public policy, promoting the protection of the insured and the public at large. (*Id.* at p. 672.) So too, statutes which affect existing insurance contracts, enacted to promote the public interest, are invariably upheld as a reasonable exercise of the

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[20] As the Supreme Court in *Foley v. Interactive Data Corp., supra,* 47 Cal.3d 654 observed: " '[J]ust as the law of contracts fails to provide adequate principles for construing the terms of an insurance policy, the substantial body of law uniquely applicable to insurance contracts is practically irrelevant to commercially oriented contracts. . . . These [unique] features characteristic of the insurance contract make it particularly susceptible to public policy considerations.' [Citation.]" (*Id.* at p. 690.) Although recent decisions of the Supreme Court have imposed some limitations upon the insured's preferred treatment in the interpretation and construction of insurance policies (see, e.g., *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822-823), such limitations do not alter the fundamental point that the law recognizes that the relationship between an insurer and an insured is both special and unique.

State's police power. (See, e.g., *Carpenter v. Pacific Mut. Life Ins. Co.* (1937) 10 Cal.2d 307, 329; *Hinckley v. Bechtel Corp.* (1974) 41 Cal.App.3d 206, 215.) It is clear that the state's significant public policy concerns for the less powerful insureds, which bolster its power to regulate this "quasi-public" business of insurance, also prompted the enactment of section 340.9.

2. *Legislative History Of Section 340.9*

As the legislative history of section 340.9 underscores, the Legislature enacted section 340.9 to promote an important public policy: "to bring needed relief to the victims of the Northridge earthquake." (Assem. Judiciary Com. Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, p. 2.) The Committee found compelling reports of rampant mishandling of insurance claims by insurers, and the unavailability of relief from the former administration of the Department of Insurance: "Proponents contend that there are strong public policy reasons to protect quake victims under the circumstances of this bill. They state that thousands of people who suffered damage to their homes did not receive the benefit of their insurance contracts because of the insurance companies' conduct. They further assert that ample evidence exists to show that insurers handling Northridge earthquake claims engaged in a systematic program of misleading consumers about the nature and extent of damage to their homes. Later, when it became clear that the problems were indeed significant, proponents assert that the insurers simply refused to pay claims on the basis that the claims had become time-barred." (*Id.* at p. 5.) "To compound problems, proponents note that when

homeowners complained to the Department of Insurance to obtain relief, the department afforded no help. Thus, based on the circumstances surrounding the Northridge earthquake, proponents argue that there are sufficient public policy reasons to extend the statute of limitations and allow the homeowners to seek justice on their insurance claims." (Sen. Bill No. 1899, 3d reading May 23, 2000, Sen. Rules Comm. (1999-2000 Reg. Sess.) p. 4.)[21] The

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[21] The legislative history of section 340.9 clearly supports the conclusion that the statute was passed to "bring needed relief to victims of the Northridge earthquake." The author of the bill states that "the one-year statute of limitations that is current law under Insurance Code section 2071 has barred victims from being fairly compensated for their losses . . . [because they] were misled about the extent of damage done as a result of the earthquake." (Sen. Judiciary Com. Analysis of Sen. Bill 1899 (1999-2000 Reg. Sess.) as amended May 9, 2000, p. 3.) The legislative history continues, "News accounts have asserted that many of the quake victims have yet to receive full and fair compensation from their insurance companies to cover the costs incurred as a result of the quake. Many victims . . . have received only partial settlements for their earthquake claims, and others have received no compensation at all, having been improperly told that the damage they suffered was below policy deductibles. In subsequent years, families have discovered damage that either was ignored or missed by the original claims adjuster, yet some insurers, according to . . . news accounts, have stonewalled claims, leaving homes, condominiums and apartment building in shambles and homeowners without any recourse." (Sen. Bill No. 1899, 3d reading July 6, 2000, Sen. Judiciary Com. (1999-2000 Reg. Sess.) p. 2.) According to the statute's author, section 340.9 was intended to "provide these individuals who . . . were victimized twice, (once by the earthquake and a second time by their insurance companies) with a reasonable 'second chance' to seek redress for their damages." (*Id.* at p. 3.)

Legislature also considered the opposition of the insurers, including arguments that the reopening of claims "that an insurer [had] legally denied from Northridge claimants through the introduction of retroactive legislation . . . raises serious constitutional questions" (*id.* at p. 5), but after extensive analysis, determined these objections were without merit.[22]

c. *Code of Civil Procedure Section 340.9 Is Constitutional*

(1) *There Is No Impermissible Impairment of Contract*

20th Century asserts section 340.9 violates the contract clauses of both the United States and California Constitutions in that it "abrogates the contractual litigation deadline for Northridge earthquake victims prescribed in every California insurance policy" and "purports to invalidate the finality of certain agreements

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[22] See also Assembly Committee on Judiciary, Analysis of Senate Bill 1899, (1999-2000 Regular Session) as amended May 23, 2000, pages 3-7, Exhibit 1 to Amici's Request for Judicial Notice. The Legislature's detailed consideration, and rejection, of the claimed constitutional objections to Code of Civil Procedure section 340.9, demands increased deference. Where "the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision . . . a focused legislative judgment on the question enjoys *significant weight and deference* by the courts." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180 (italics added).)

for settlement and release of Northridge earthquake claims. . . . "[23]

Both the United States and California Constitutions contain clauses prohibiting the Legislature from passing laws which impair the obligations in contracts. (See U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) Although the language of both contracts clauses is facially absolute, it has been determined that their "prohibition[s] must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.' " (*Energy Reserves Group v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 410 (*Energy Reserves*).) Thus, impairment of an existing contract is not necessarily unconstitutional. "The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." (*United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 22.)

In *Energy Reserves, supra,* the court indicated that in determining whether legislation violates the contracts clause, three factors must be considered: (1) " 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship,' " (2) if the state law constitutes a substantial impairment of contract rights, does it nevertheless have a "significant and legitimate public purpose" such as "the remedying of a broad and general social or economic problem" and (3) if such a legitimate purpose is established, is "the adjustment of 'the rights and responsibilities of contracting parties

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[23] Although raised by 20th Century, the question of the impact of section 340.9 on the finality of settlement agreements is not directly at issue in this case.

[. . . based] upon reasonable conditions and . . . of a character appropriate to the public purpose justifying [the legislation's] adoption.' " (*Id.* at pp. 411-412.) The *Energy Reserves* court recognized that " 'as is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.' " (*Id.* at pp. 412-413.)

In determining whether legislation amounts to a substantial impairment, one factor to be considered is "whether the industry the complaining party has entered has been regulated in the past." (*Energy Reserves, supra,* 459 U.S. at p. 411.)[24] Whether the state actively regulates the industry at issue frames the parties' reasonable expectations and minimizes any potential statutory impairment.[25] (*Id.* at p. 416.) In California, the insurance business "is a highly regulated industry, and one in which further regulation can reasonably be anticipated." (*Calfarm Ins. Co. v. Deukmejian, supra,* 48 Cal.3d 805, 830; see fn. 19, *ante.*) The *Calfarm* court noted that by at least 1988, "insurers were well aware of the possibility that

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[24] It is appropriate to rely on federal precedent in analyzing violations of both the California and United States Contract Clauses. This was the approach utilized in *Calfarm Ins. Co. v. Deukmejian, supra,* 48 Cal.3d 805, 827-829.

[25] For example, in *Energy Reserves,* the contested Kansas statute sought to regulate natural gas prices in existing contracts. The court observed Kansas already heavily regulated the industry, and rationalized that the industry should have reasonably expected its contracts were subject to alteration by state regulation. (*Id.* at p. 416.)

initiatives or ordinary legislation might be enacted that would affect existing policies." (*Id.* at p. 831.)

In light of its past extensive exercise of legislative power over the insurance industry to help victimized insureds, insurers should reasonably have expected the California Legislature to enact legislation designed to help insureds affected by the 1994 Northridge earthquake. The court in *Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal.App.4th 554, acknowledged as much when it dismissed an individual's injunctive relief action against insurers based on their refusal to sell any new homeowners policies in order to avoid providing earthquake coverage, deferring to the Legislature's expressed intent to deal with problems arising from the 1994 earthquake "both now and in the future." (*Id.* at p. 568.) The Legislature's enactment of section 340.9 to correct insurers' wrongful processing of Northridge earthquake claims should have been reasonably expected, rendering the insurers' policies susceptible to alteration.

The revival of barred claims for one year fails to rise to the level of an 'impairment' of a contract, because it merely affects the remedy for the violation of the contract, not the obligations contained within it. (See *Home Bldg. & L. Assn. v. Blaisdell* (1934) 290 U.S. 398, 445-448; *Lincoln v. Superior Court* (1934) 2 Cal.2d 127, 129.) This is also true of section 340.9. It simply affects a remedy; it does not create or destroy any substantive rights.[26] As the

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[26] Simply because the provision is in the insurance policy, as required by Insurance Code section 2071, does not cloak the contract with inviolate rights. "One whose rights, such as they are, are subject to state restriction, cannot remove them from the

United States Supreme Court opined in *Campbell v. Holt, supra,* 115 U.S. at p. 628, the defense of the limitations bar is not a "vested right," and a statute which revived a *contractual right* to payment which had already lapsed did not violate the contract clause.

Similarly, application of section 340.9 to settlement agreements entered into without California counsel does not substantially impair such contracts. The statute on its face does not declare the agreements null or void; it simply revives barred claims so that they can be further addressed. Indeed, the statute's reference to settlement agreements serves only to describe one of the circumstances where section 340.9 will *not* apply. The ultimate viability of those settlement agreements is not "impaired." Moreover, even if section 340.9 could be said to "substantially impair" existing insurance contracts and settlement agreements, it may constitutionally do so to address a legitimate public purpose appropriately adjusted to the rights and responsibilities of the affected parties. (*Energy Reserves, supra,* 459 U.S. 400, 411-413.)

For example, former Civil Code section 5124 (repealed effective January 1, 1986) indisputably, yet legitimately, impaired final community property settlement agreements, judgments or decrees, to include a division of military retirement benefits. In *In re Marriage of Potter* (1986) 179 Cal.App.3d 73, the court rejected due process and contract clause challenges to application of section 5124 to a final judgment previously stipulated to

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power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter." (*Hudson Water Co. v. McCarter* (1908) 209 U.S. 349, 357.)

by the parties in light of "[t]he 'paramount interest' of this state in the equitable distribution of marital property upon dissolution of marriage." (*Id.* at p. 84.)

In *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, the Supreme Court retroactively applied amended former Civil Code section 5118 to an existing interlocutory judgment.[27] That section changed the husband's earnings and accumulations while living apart from community property to separate property. Acknowledging the statute, as amended, impaired the wife's *vested* property rights, acquired prior to the date of the amendment, the Supreme Court nonetheless concluded that "this use of the police power to abrogate rights in marital property that derived from the patently unfair former law" justified the impairment. (*Id.* at p. 594.)

Legitimate state interest also may change contract provisions. For example, the *Energy Reserves* court upheld a Kansas Act, which regulated prices in already existing contracts, as a reasonable exercise of its police power to "protect consumers from the escalation of natural gas prices caused by deregulation," observing that "higher gas prices have caused and will cause hardship among those who use gas heat but must exist on limited fixed incomes." (*Energy Reserves, supra,* 459 U.S. at pp. 416-417.) In California, the Supreme Court in *Calfarm* upheld provisions of Proposition 103, which altered the terms of existing insurance policies so as only to allow cancellation of those contracts on certain, specified conditions, in order

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[27] Now Family Code section 771.

to continue to make insurance " 'available' " to Californians and avoid a potential crisis. (*Calfarm Ins. v. Deukmejian, supra,* 48 Cal.3d at p. 831.)

The Legislature enacted section 340.9 to alleviate a broad and significant problem caused by the insurers' conduct; to help thousands of policyholders who were misled by the insurers into waiving their right to make claims in a timely manner. This purpose is backed by the power of the Legislature to protect California's citizens and provide for their general welfare and justifies any potential impairment of contract provisions. (See *Home Bldg. & L. Assn. v. Blaisdell, supra,* 290 U.S. at p. 444 [statute extending time for redemption from mortgage foreclosure sales was held to constitute a legitimate and substantial legislative purpose].)

Finally, the revival of the statutory remedy is appropriately limited in time and application. Section 340.9 is only operative for the period of one year, and is limited to claims where the insurers had already been contacted prior to January 1, 2000, to claims not finally litigated, and to claims not settled through a California attorney. Special deference is granted to temporary statutes. (See *Home Bldg. & L. Assn. v. Blaisdell, supra,* 290 U.S. at p. 445.) When viewed with the proper legislative deference, this legislation does not impermissibly impair 20th Century's contract rights.

(2) *No "Vested Contract Rights" Are Destroyed In Violation of the Due Process Clause*

According to 20th Century, the retroactive application of section 340.9, subdivision (b), destroys its vested

contractual right to repose following expiration of the contractual one-year limitation period. This argument, however, ignores what appears to be settled law. The "contractual" limitation period in 20th Century's policy is mandated by statute (Ins. Code, § 2071). It is therefore properly treated as a *statute* of limitations which does *not*, upon its expiration, endow in the defendant a "vested right." Insurance Code section 2071's mandated provisions are treated identically to statutes of limitations. (See *California Union Ins. Co. v. Poppy Ridge Partners* (1990) 224 Cal.App.3d 897, 903.)[28] In *California Union*, the insurer failed to plead the one year limitations period as an affirmative defense and argued that it was sufficient to claim that the insured had failed to satisfy the provisions of the contract. The court disagreed, explaining the insurer had "advanced no substantive, convincing reason for distinguishing [the contractual limitations period] from a statutory limitations period which is a personal privilege affecting the remedy only and waivable in advance, by contract, or by failure to plead it . . . For some purposes contractual and statutory limitations periods have been treated similarly. [Citation.] [The court] conclude[d] the contractual limitations period should be treated the same as a statutory one, as an affirmative defense that must be pled as such or is waived." (*Id.* at p. 903, see also *Lawrence v. Western Mutual*

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[28] Technically, Insurance Code section 2071 mandates the one-year limitation period only in fire insurance policies. However, as the earthquake insurance provision was a part of Ahles' homeowner's policy which included fire insurance coverage, we see no legal significance to this technical point. (See also discussion on this issue in next section d.)

Ins. Co. (1988) 204 Cal.App.3d 565, 573 [the section 2071 contractual limitations period should "function no differently" than a legislatively enacted statute of limitations].)[29]

The running of a statute of limitations does not grant a defendant a *vested* right of repose. (See *Nelson v. Flintkote Co.* (1985) 172 Cal.App.3d 727, 733.) The *Nelson* court held a personal injury action could not be automatically extinguished by the mere passage of time, but rather that the "statute of limitations is an affirmative defense which must be pleaded by a defendant and ruled on by a court." (*Id.* at p. 732.) In *Gallo v. Superior Court* (1988) 200 Cal.App.3d 1375, the court stated, "[a] potential defendant has no vested right in the sense of repose conferred by his knowledge a lawsuit against him appears to be barred." (*Id.* at p. 1383.) In other words, because the limitations period operates as an affirmative defense which is inoperative until certain conditions are met (i.e., it is properly plead and accepted by a court) it cannot be deemed a vested right. (See *In re Marriage of Bouquet, supra,* 16 Cal.3d 583, 591, fn. 7, ["We use the

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[29] Moreover, the argument that the limitations period in insurance contracts constitutes an inviolate contractual provision, infused with the rights of other contract provisions, has been rejected by our Supreme Court: " 'It is no longer open to question that the business of insurance is affected with a public interest . . . *Neither the company nor a policyholder has the inviolate rights that characterize private contracts. The contract of the policyholder is subject to the reasonable exercise of the state's police power.*" (*Calfarm Ins. Co. v. Deukmejian, supra,* 48 Cal.3d 805, 830, emphasis added, citing *Carpenter v. Pacific Mut. Life Ins. Co.* (1937) 10 Cal.2d 307, 329.)

word vested here to describe property rights that are not subject to a condition precedent."].)[30]

Second, even if the running of the limitations period created a vested right in defendant, such a right yields to important state interests, without any violation of due process. In *Addison v. Addison* (1965) 62 Cal.2d 558, 566 the court indicated that: " 'Vested rights, of course, may be impaired "with due process of law" under many circumstances. The state's inherent sovereign power includes the so called "police power" right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people. The annals of constitutional law are replete with decisions approving, as constitutionally proper, the impairing of, and even the complete confiscation of, property rights when compelling public interest justified it. . . . *The constitutional question, on principle, therefore, would seem to be, not whether a vested right is impaired by a marital property law change, but whether such a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment.*' " (Italics added.) The *Addison* court easily permitted impairment of vested property rights by the retroactive application of quasi-community legislation where it was justified by overriding societal concerns. In

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[30] No due process violation claim can be made if the Legislature simply enacts a one year statute of limitations, and then extends it. (*Chase Securities Corp. v. Donaldson, supra,* 325 U.S. 304, 316 ["[c]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment."].)

In re Marriage of Bouquet, supra, 16 Cal.3d 583, 594, the court also upheld the impairment of a spouse's vested property rights by a community property statute retroactively applied due to the Legislature's intent to correct "rank injustice of . . . former law."[31]

Similarly, in *Battle v. Kessler* (1983) 149 Cal.App.3d 853, 860, the court permitted an amended statute to apply retroactively to previously barred claims, for the period of one year, because the Legislature acted "to right a wrong." (See also *Lent v. Doe, supra,* 40 Cal.App.4th 1177 [applied Code of Civil Procedure section 340.1 to previously barred claims.]; *Liebig v. Superior Court, supra,* 209 Cal.App.3d at p. 834 [applied newly enacted section 340.1, which extended the statute of limitations for child molestation cases to previously barred causes of action, because "the law is clear that vested rights are not immune from retroactive laws when an important state interest is at stake"]; *Nelson v. Flintkote Co., supra,* 172 Cal.App.3d at p. 732.)

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[31] In *In re Marriage of Bouquet, supra,* Justice Tobriner identified several factors that may be considered in determining whether a retroactive law contravenes the due process clause, including "the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions." (*In re Marriage of Bouquet, supra,* 16 Cal.3d 583, 592.) However, "where 'retroactive application is necessary to subserve a sufficiently important state interest' [citation], the inquiry need proceed no further." (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 761.)

In enacting section 340.9, the Legislature took action to advance the public interest in protecting insureds mistreated by their insurers, at a time when the insureds were most vulnerable. Section 340.9's protection of insureds reflects well-established legislative and judicial policy, and is buttressed by the Legislature's unique power to regulate the "quasi-public" business of insurance. Such legislative action is propelled by an "important state interest" and is constitutional.

d. *The Term "Statute of Limitations" As Used In Section 340.9, Embraces The Contractual Limitation Period Included In 20th Century's Policy*

An examination of Insurance Code section 2071 reflects that the Legislature, in statutorily dictating policy terms, has effectively changed the 4 year limitations period which would otherwise apply to a suit on an insurance contract (Code Civ. Proc., § 337, subd. (1)). Because this statutory dictate results in a contractual provision, it is not incorrect to refer to it as the articulation of a "contractual" limitations period. Accordingly, 20th Century argues that, because section 340.9 refers only to the "applicable *statute* of limitations," it does not apply to the statutorily mandated "contractual" limitations period included in its policy.

In the context of applying section 340.9, however, this is a thin semantical reed on which to hang the conclusion that the phrase used in that section, "applicable *statute* of limitations" (italics added) does not also include the statutorily mandated "contractual" limitations period. To the contrary, it seems clear to us that the Legislature intended

the phrase "applicable statute of limitations" to embrace the mandated contractual period. Indeed, that is the only limitations period applicable to the claims asserted by policyholders to which the statute is addressed. Since the obvious legislative purpose behind the enactment of section 340.9 was to bring relief to policyholders with claims under policies, *all of which contain the contractual limitations provision*, it would be absurd for us to adopt 20th Century's construction of this phrase.

"While it is not the prerogative of the judiciary to rewrite legislation to conform to a *presumed* intent [citation] the [California] Supreme Court reminds us that the primary purpose of statutory construction is for the courts to determine and effectuate the purpose of the law as enacted: 'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] But "[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." [Citations.] Thus, "[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." [Citation.] Finally, we do not construe statutes in isolation, but rather read every statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." [Citation.]' [Citation.]" (*McLaughlin v. State Bd. of Education* (1999) 75 Cal.App.4th 196, 210-211 (original italics), citing *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.*

(1997) 14 Cal.4th 627, 633; *People v. Pieters* (1991) 52 Cal.3d 894, 898-899.) "[E]ach sentence [phrase and word] must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation]." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

In *McLaughlin v. State Bd. of Education, supra,* the court was called upon to interpret proposition 227, the " 'English Language in Public Schools' " initiative statute. (*Id.* at p. 201.) The initiative enacted a statutory scheme which required California public schools to teach children with limited English proficiency only in English. The *McLaughlin* court was asked to determine, in view of the fact that Proposition 227 was silent on the matter, whether the initiative was subject to a provision in Education Code section 33050, which generally allows schools to apply for waivers from such program requirements.

After thoroughly reviewing the history of both Proposition 227 and Education Code section 33050, the court concluded that the respondent school boards could not, under section 33050, apply for waivers from the requirements of the statutory scheme enacted by Proposition 227. (*McLaughlin v. State Bd. of Education, supra,* 75 Cal.App.4th at p. 202.) The court determined that "[t]o the extent there [was] any ambiguity as to the intent of Proposition 227, the legislative history clarifie[d] that the Chapter was designed to wrest from school boards and administrators decisionmaking authority for selecting between [limited English proficiency] educational

options, and repose this power exclusively in parents of [limited English proficiency] students." (*Ibid.*)

In the present case, our review of the legislative history makes it clear that the Legislature intended the phrase "applicable statute of limitations" to embrace the mandated contractual period. During the legislative process, SB 1899 was amended to provide, "Notwithstanding any other provision of law *or contract*,. . . . "[32] Clearly, the Legislature sought to revive the time bar created by the one year limitation period contained in policies providing insurance coverage for the 1994 Northridge earthquake. Given the obvious and universally appreciated fact that every claimant to be benefited by section 340.9 has a one year limitation period in his or her insurance policy, and it was the bar created by that one year clause (upon which insurers had relied in denying claims) that the Legislature sought to address, it would be folly to conclude that the Legislature intended to make a distinction between "statutory" and "contractual" limitations periods when it enacted section 340.9. In this context, the use of the term, "applicable *statute* of limitations" was simply a generic reference to the limitations period that the Legislature intended to reach by its enactment of section 340.9. Such generic use of the term was no different than the "lawyer's shorthand" utilized by 20th Century itself when it demurred to Ahles' pleadings on the

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[32] This amendment was proposed by the author of SB 1899, Senator Burton, who stated in the Senate Judiciary Committee, by way of explanation, that the addition of the words "or contract" after the word "law" was technical in nature "since earthquake policies are written pursuant to form fire policy [*sic*] contained in the Insurance Code."

ground that the *"statute* of limitations *contained in the insurance policy"* had expired.[33]

Any other interpretation would not only fail to conform to the spirit of section 340.9, but would lead to an absurd result. The legislative history of section 340.9 indicates the statute was enacted to "bring needed relief to the victims of the Northridge earthquake." (Assem. Judiciary Com. Analysis of Sen. Bill No. 1988 (1999-2000 Reg. Sess.) as amended May 23, 2000, p. 2.) Since all the victims' policies contain the one-year *contractual* limitations period, to interpret section 340.9 as not applying to that limitations period would, in effect, completely nullify the statute. Accordingly, we conclude the Legislature's failure to refer to a "contractual" limitations period can only be attributed to " 'drafters' oversight.' " (*McLaughlin v. State Bd. of Education, supra,* 75 Cal.App.4th at p. 223.)

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[33] While it is true that the one year limitations period is only mandated by Insurance Code section 2071 for fire policies (but not for separately issued "stand alone" earthquake policies) we attribute no significance to such circumstance. As noted in footnote 32, *ante,* the author of SB 1899 placed no significance on the distinction either. He simply pointed out that it was the insurers' standard practice to incorporate the form language from section 2071 into all of its policies. For all of the reasons which we have discussed, there can be no doubt that section 340.9 was intended to revive claims barred by the one year "contractual" provision in policies of insurance whether those provisions were mandated by statute or simply copied by insurers into their "stand alone" earthquake policies. Whether mandated or not, we are satisfied that the Legislature had the power to revive claims barred under such clauses and clearly intended to do so.

Our conclusion is bolstered by the court's decision in *California Union Ins. Co. v. Poppy Ridge Partners, supra,* 224 Cal.App.3d 897. There, the court determined that, to rely on the expiration of a contractual limitations period as a defense, the defendant was required to raise it in his or her answer, just as he or she would be required to raise a statutory limitations period. The court noted that the defendant had advanced "no substantive, convincing reason for distinguishing [the contractual limitations period] from a statutory limitations period. . . . " (*Id.* at p. 903.) Just like a statutory limitations period, the contractual limitations period mandated by Insurance Code section 2071 could be waivable in advance by contract or a failure to plead it. (*Ibid.*) The court recognized that, "[f]or some purposes contractual and statutory limitations periods have been treated similarly." (*Ibid.*)[34]

The construction and application of section 340.9 renders it a statute which necessitates the statutorily required contractual limitation to be equated with a statutory limitation. For purposes of a proper reading of section 340.9, they are the same and should be so construed.

e. *Ahles' Claim Was Not "Litigated To Finality"*

Code of Civil Procedure section 340.9, subdivision (d)(1) provides that revival of the limitation period does not apply to claims which have been "litigated to finality in *any* court of competent jurisdiction prior to [January 1,

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[34] See also our discussion of this point in a related context in the preceding section c. (2). (*Lawrence v. Western Mutual Insurance Co., supra,* 204 Cal.App.3d at p. 573.)

2001]." (Italics added.) In California, however, "[a]n action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed. . . . " (Code Civ. Proc., § 1049.) Thus, a judgment in California is not final for all purposes until "all possibility of direct attack thereon by way of (1) appeal, (2) motion for a new trial, or (3) motion to vacate the judgment has been exhausted." (*Southern Pacific Utilities Dist. v. Silva* (1956) 47 Cal.2d 163, 165; 7 Witkin, Cal. Procedure (4th ed. 1997), Judgment, § 7; see also, *McKee v. National Union Fire Ins. Co.* (1993) 15 Cal.App.4th 282, 286.) In *McKee*, the court interpreted Insurance Code section 11580, subdivision (b)(2), which requires that every insurance policy contain a provision providing that an action may be brought on the policy after final judgment against the insured has been entered. The court interpreted section 11580, subdivision (b)(2), as meaning that "the statute and standard policy language permit an action against an insurer only when the underlying judgment is final and 'final,' for this purpose, means an appeal from the underlying judgment has been concluded or the time within which to appeal has passed." (*McKee v. National Union Fire Ins. Co., supra,* 15 Cal.App.4th at p. 285.) Thus, in this sense, the courts speak of "finality" for *res judicata* purposes. (*Id.* at p. 288.)

By *not* using the ambiguous term, "final judgment," but rather limiting the exception to cases which have been "litigated to finality," the Legislature has in our view, made it clear that it intends section 340.9 to apply to all cases which have not been finally decided *on appeal.* Thus, the Legislature has emphasized its intention that

"finality" in the *res judicata* sense is required before section 340.9, subdivision (d)(1)'s exception will apply. Indeed, by not using the word "judgment" in section 340.9, subdivision (d)(1), the Legislature avoided any suggestion that a "final" (for notice of appeal purposes) trial court judgment might make section 340.9 inapplicable. Thus, " 'the settled rule in California . . . that a judgment is not final so long as an appeal is pending therefrom' " applies here (*McKee v. National Union Fire Ins. Co., supra,* 15 Cal.App.4th at p. 286, quoting *Jennings v. Ward* (1931) 114 Cal.App. 536, 537) and section 340.9(d), subdivision (1) does not bar the revived statute of limitations available under section 340.9 from applying to this action.[35]

We therefore reject 20th Century's argument that the statute's reference to claims litigated to finality in *any* court of competent jurisdiction would apply to the trial court's earlier order sustaining 20th Century's demurrer without leave to amend. While the Superior Court certainly is a court of competent jurisdiction, for the reasons discussed above, we cannot construe the statutory language so narrowly. Litigated finality must be read to mean a final judgment in the res judicata sense.

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[35] We recognize that one federal case has construed section 340.9 as does 20th Century. (See *Campanelli v. Allstate Ins. Co.* (C.D. Cal. 2000) 119 F.Supp.2d 1073, 1075.) We believe, however, to the extent that *Campanelli* is not procedurally distinguishable, it was wrongly decided and we decline 20th Century's invitation to follow it.

f. *The Revival of Section 340.9 Extends To Ahles' Bad Faith Tort Claim But Not To Her Fraud Claim*

Section 340.9 revives "*any insurance claim* for damages *arising out of* the Northridge earthquake" which is barred as of January 1, 2001, *solely* because the applicable statute of limitations has expired. Thus, the express language of the statute applies not only to contract damage claims, but also to tort claims for insurer bad faith (i.e., a breach of the implied covenant of good faith and fair dealing). To determine the intent of statutory language " ' "[t]he court turns first to the words themselves for the answer." ' " (*J.C. Penney Casualty Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1020.) A claim based on an insurer's breach of the covenant of good faith and fair dealing that is *implied in every policy of insurance* is clearly within the plain meaning of the phrase "*any insurance claim . . . arising out of. . . .* " (§ 340.9, subd. (a), italics added.)

Moreover, the plain reading of the statute's words comports with the legislative intent in enacting this law. The legislative history reveals "allegations of widespread abuse by insurers who . . . may have committed numerous acts of bad faith by denying the legitimate claims of potentially thousands of Northridge earthquake victims." (Assem. Judiciary Com. Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, pp. 2-3.) The "companies repeatedly low-balled claims, failed to inform policyholders of their benefits and forced many claimants to sue to get full payment." (*Id.* at p. 3.) "According to the author, SB 1899 seeks to provide these individuals, who . . . were victimized twice (once by the

earthquake and a second time by their insurance companies) with a reasonable 'second chance' to seek redress for their damages." (*Ibid.*) Inclusion of tort claims in section 340.9 furthers the legislative purpose that victims obtain damages for their insurers' misconduct. "The availability of tort remedies in the limited context of an insurer's breach of the covenant advances the social policy of safeguarding an insured in an inferior bargaining position who contracts for calamity protection, not commercial advantage." (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400, italics omitted.)

Finally, the Legislature contemplated that the new law would revive claims barred by the insurance policies' one-year limitations provision, the minimum limitations period set by Insurance Code section 2071.[36] Case law has likewise applied that same one year limitation provision to claims for insurers' breach of the covenant of good faith and fair dealing. (See, e.g., *Jang v. State Farm Fire & Casualty Co.* (2000) 80 Cal.App.4th 1291, 1301 [holding that "[r]egardless of whether the insured elects to file a complaint alleging solely tort claims . . . an action seeking damages recoverable under the policy for a risk insured under the policy is merely a 'transparent attempt to recover *on the policy*' " (original italics)]; *Velasquez v. Truck*

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[36] According to the bill's author, "the one-year statute of limitations contained in Insurance Code section 2071 has barred victims from being compensated for their losses because they were tragically misled about the extent of damage suffered as a result of the earthquake" and once they learned the truth they were prohibited by the statute from filing a claim. (Sen. Bill No. 1899, 3d reading May 23, 2000, Sen. Rules Comm. (1999-2000 Reg. Sess.) p. 2.)

Ins. Exchange (1991) 1 Cal.App.4th 712, 722 [opining that a "bad faith action based on denial of a claim in the underlying policy is an action on the policy"]; *Prieto v. State Farm Fire & Casualty Co.* (1990) 225 Cal.App.3d 1188, 1195 [court found "neither reason nor authority to signify that a plaintiff's election to seek redress under the implied covenant rather than the express contract should nullify the legislatively prescribed limitation for actions that are 'on the policy' because grounded in a failure to pay benefits that are due under the policy and indeed constitute its very reason for being"]; see also *Abari v. State Farm Fire & Casualty Co.* (1988) 205 Cal.App.3d 530, 536; *Lawrence v. Western Mutual Ins. Co., supra,* 204 Cal.App.3d at p. 575.)

With respect to Ahles' fraud claim, however, we reach the opposite conclusion. While we are persuaded that bad faith claims that are *seeking damages recoverable under the policy,* such as those presented in *Jang, Velasquez, Prieto, Abari and Lawrence, supra,* have the same limitations period applicable to claims for breach of contract, and constitute *insurance claims,* the rationale which justifies that conclusion has no application to Ahles' fraud claim. Her action for fraud does not rest on 20th Century's failure to perform under the policy, but rather on its alleged acts of deceit and deception that go well beyond simple nonperformance. That the purpose of such alleged fraudulent behavior may have been to evade performance under the policy does not alter the conclusion that an entirely separate act of misconduct has been alleged. In addition, Ahles does not seek damages recoverable under the policy, but rather damages arising from 20th Century's alleged misrepresentations and Ahles'

reliance including such things as out of pocket premium expense, lost opportunity damages and recovery for resulting emotional distress. For these reasons, we do not perceive Ahles' fraud claim as an *"insurance claim for damages"* as that term is used in section 340.9. Therefore, Ahles' fraud claim remains subject to the three-year limitation period set out in Code of Civil Procedure section 337 and her claim, if expired under that statute, will not be revived by section 340.9.

DISPOSITION

The order to show cause heretofore issued is discharged. The trial court's order of December 5, 2000, is affirmed and the peremptory writ is denied. The stay order heretofore issued shall be vacated as of the date of the filing of a remittitur herein. Ahles shall recover her costs in these writ proceedings.

CERTIFIED FOR PUBLICATION

CROSKEY, J.

We Concur:

KLEIN, P.J.

ALDRICH, J.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 3

August 20, 2001

20th Century Insurance Company
vs.
S.C.L.A.
Linda P. Ahles

B147464
Los Angeles County No. BC 215771

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

LINDA P. AHLES, Plaintiff, v. 20th CENTURY INSURANCE a Corporation, DOES 1 through 15, Inclusive, Defendants.	CASE NO. BC215771 JUDGE PAUL GUTMAN, DEPT. 33 JUDGMENT OF DISMISSAL (Filed Oct. 3, 2000)

IT IS HEREBY ORDERED that a Judgment of Dismissal of plaintiff's Complaint (including all amended complaints) be entered in favor of defendant in the above-entitled action in accordance with Court Order sustaining without leave to amend defendant's Demurrer to plaintiff's Second Amended Complaint of September 29, 2000.

APPROVED AS TO FORM AND CONTENT.

DATED: 10/3/00 /s/ Paul Gutman
PAUL GUTMAN
JUDGE OF THE SUPERIOR COURT

JUDGMENT OF DISMISSAL

PROOF OF SERVICE – 1031a(3) C.C.P.

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 7700 Irvine Center Drive, Suite 700, Irvine, CA 92618-2929.

On **October 3, 2000,** I served the foregoing document described as **JUDGMENT OF DISMISSAL** on the interested parties in this action as set forth on the attached service list in the following manner:

(X) **BY MAIL.** I am familiar with this firm's practice of collection and processing correspondence for mailing with the United States Postal Service, and that the correspondence shall be deposited with the United States Postal Service on the same day in the ordinary course of business pursuant to Code of Civil Procedure §1013a. I am aware that on a motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

( ) **BY FACSIMILE.** In addition to service by mail as set forth above, a copy of said document(s) was also delivered by facsimile transmission to the addressee(s) pursuant to Code of Civil Procedure §1013(e).

( ) **BY PERSONAL SERVICE.** I caused a true copy of said document(s) to be hand-delivered to the addressee(s) via a California registered process server pursuant to Code of Civil Procedure §1011.

( ) **BY EXPRESS MAIL.** I caused said document(s) to be deposited in a box or other facility regularly maintained by the express service carrier providing overnight delivery pursuant to Code of Civil Procedure §1013(c).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **October 3, 2000**, at Irvine, California.

/s/ Marsha A. Bivens
MARSHA A. BIVENS

* * * * * * * * * * * *

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**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES**

DATE: 12/05/00	DEPT. 33
HONORABLE PAUL GUTMAN JUDGE	R. VILLARREAL DEPUTY CLERK
HONORABLE JUDGE PRO TEM	ELECTRONIC RECORDING MONITOR
C. KIMBELL, CA Deputy Sheriff	B. DIAZ Reporter

8:30 am	BC215771	Plaintiff Counsel C. MICHAEL ALDER (X)
	LINDA P AHLES VS 20TH CENTURY INSURANCE	Defendant Counsel MICHAEL J. MCGUIRE (X)

NATURE OF PROCEEDINGS:

PLAINTIFF'S MOTION FOR RECONSIDERATION OF COURT'S RULING OF OCTOBER 3, 2000;

The motion is called for hearing and argued. The Motion For Reconsideration is granted. The Demurrer of Defendant 20th Century heard on 9/29/00 is overruled unless: prior to 1/16/01 an executive event, legislative event, or judicial event, occurs which serves to nullify or substantially modify the law, SB 1899. Defendant is

to file an answer no later than 30 days from 1/16/01

The Motion to Strike the Second Amended Complaint previously ordered off calendar as moot is set for 1/16/01 at 8:30 a.m.

The case is ordered to judicial mediation. Mediation completion date is 3/16/01. Post mediation status conference is 3/23/01 at 8:30 a.m.

The case is set for trial on 9/24/01 at 9:30 a.m. Final status conference is 9/14/01 at 8:30 a.m.

Plaintiff is to give notice and provide notice of ruling.

MINUTES ENTERED
12/05/00
COUNTY CLERK

Court of Appeal, Second Appellate District,
Division Three – No. B147464
S100366

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Oct. 17, 2001)

20TH CENTURY INSURANCE COMPANY, Petitioner

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;

LINDA P. AHLES, Real Party in Interest.

Petition for review DENIED.

Kennard, J., and Brown, J., are of the opinion the petition should be granted.

/s/ GEORGE
Chief Justice

California Code of Civil Procedure

§ 340.9 Northridge earthquake insurance claims

(a) Notwithstanding any other provision of law or contract, any insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of the effective date of this section solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of the effective date of this section. This subdivision shall only apply to cases in which an insured contacted an insurer or an insurer's representative prior to January 1, 2000, regarding potential Northridge earthquake damage.

(b) Any action pursuant to this section commenced prior to, or within one year from, the effective date of this section shall not be barred based upon this limitations period.

(c) Nothing in this section shall be construed to alter the applicable limitations period of an action that is not time barred as of the effective date of this section.

(d) This section shall not apply to either of the following:

(1) Any claim that has been litigated to finality in any court of competent jurisdiction prior to the effective date of this section.

(2) Any written compromised settlement agreement which has been made between an insurer and its insured where the insured was represented by counsel admitted to the practice of law in California at the time of the settlement, and who signed the agreement.

(Added by Stats.2000, c. 1090 (S.B.1899), § 1.)

No. 01-941 (2)

Supreme Court U.S.
FILED
MAR 4 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

20TH CENTURY INSURANCE COMPANY,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES; LINDA P. AHLES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

BRIEF IN OPPOSITION OF RESPONDENT LINDA P. AHLES

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15 pp

QUESTION PRESENTED

Whether California's statutorily-mandated limitations period for property insurance claims must be treated differently than an ordinary statute of limitations for the purposes of applying this Court's precedents allowing the retroactive extension of a statute of limitations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD BE DENIED 3

A. 20th Century greatly exaggerates the impact of the one year revival of certain Northridge earthquake insurance claims 3

B. The decision below correctly applied this Court's settled precedents 6

1. Section 340.9 is a statutorily-mandated limitations period, which the California Legislature was free to extend without violating the Constitution 6

2. Section 340.9 is not an unconstitutional impairment of contracts 8

C. 20th Century raises the *ex post facto* clause for the first time in its petition 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES:

Bialo v. Western Mutual Ins. Co.,
95 Cal.App.4th 68, 115 Cal.Rptr. 2d 3
(2002) 7

Bollinger v. National Union Fire Ins. Co.,
25 Cal.2d 399, 154 P.2d 399 (1944) 7

Calder v. Bull,
3 U.S. (3 Dall.) 386 (1798) 10

Campbell v. Holt,
115 U.S. 620, 6 S.Ct. 209,
29 L.Ed. 483 (1885) 2, 6

Chase Securities Corp. v. Donaldson,
325 U.S. 304, 65 S.Ct. 1137,
89 L.Ed. 1628 (1945) 2, 6, 7

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400,
103 S.Ct. 697, 74 L.Ed.2d 569
(1983) 8, 9

Exxon Corp. v. Eagerton, 462 U.S. 176,
103 S.Ct. 2296, 76 L.Ed.2d 497
(1983) 9

Hellinger v. Farmers Ins. Exch.,
91 Cal.App.4th 1049,
111 Cal.Rptr.2d 268 (2001) 4

U.S. v. Williams, 504 U.S. 36,
112 S.Ct. 1735, 118 L.Ed.2d 352
(1992) 9

Vu v. Prudential Prop. & Cas. Ins. Co.,
26 Cal.4th 1142,
113 Cal.Rptr. 2d 70 (2001) 1, 6, 8

STATUTES:

Cal. Code Civ. Proc. § 337 1

Cal. Code Civ. Proc. § 340.9 ..... *passim*

Cal. Ins. Code § 2071 ..... 1, 7, 8

STATEMENT OF THE CASE

Under California law, the statute of limitations for breach of a written contract is four years. Cal. Code Civ. Proc. § 337. But insurance claims for property damage have a one year limitation. Cal. Ins. Code § 2071; *Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal.4th 1142, 1148, 113 Cal.Rptr. 2d 70 (2001).

In 1999, the California Legislature extended the limitation period for claims arising out of the January 17, 1994, "Northridge" earthquake. The statute, codified at Cal. Code Civ. Proc. § 340.9, allowed certain insureds with claims arising out of the earthquake to file actions against their insurers between January 1, 2001, and January 1, 2002.

Respondent Linda Ahles's home was damaged in the Northridge earthquake. She had a homeowner's insurance policy, with an endorsement for earthquake coverage, issued by petitioner 20th Century Insurance Company. (App. 4, 5.) In May 1994, Ahles notified 20th Century that her property had sustained earthquake damage. (App. 5.) 20th Century sent an adjuster, and then an engineer to inspect her property. (*Id.*) Based on these inspections, 20th Century notified Ahles that the amount of damage was less than the amount of the earthquake deductible. (*Id.*) It therefore made no payment to Ahles. (*Id.*)

Roughly four years later, a termite inspector observed earthquake damage in Ahles's home. In September 1998, she filed a supplemental

claim with 20th Century for earthquake damage. (App. 5.) Almost a year later, 20th Century sent an adjuster to inspect Ahles's home. The adjuster determined that the damage was not caused by the Northridge earthquake. (*Id.*) Based on that ground, and because she had not submitted her supplemental claim within the one-year limitation period, 20th Century denied the supplemental claim. (App. 6.)

Ahles filed suit in 1999, before § 340.9 had been enacted. (Petition at 7.) The trial court initially sustained 20th Century's demurrer based on the one-year limitations period. (*Id.*) But the court reconsidered its ruling after § 340.9 became effective. (*Id.*) 20th Century sought interlocutory review of this ruling, and the Court of Appeals agreed to hear its petition. (App. 11.) After full briefing and oral argument, the Court of Appeal denied the petition in a published opinion. (App. 1.)

The court held that under this Court's decisions in *Campbell v. Holt*, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483 (1885) and *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945), and parallel California authority, the Legislature was free to revive a civil cause of action that has become time-barred under a former statute of limitations. (App. 18, 19.) The court noted that insurance was an extensively regulated industry, and that the legislative history of § 340.9 showed that the Legislature considered "compelling reports of rampant mishandling of insurance claims by insurers [after the Northridge earthquake], and the unavailability

of relief from the former administration of the Department of Insurance." (App. 22, 26.) The court held that the revival of time-barred claims for one year did not rise to the level of a substantial impairment of the insurers' contracts, nor did it destroy any vested contract rights in violation of the due process clause. (App. 31 and 35-37.)

The Court of Appeal denied 20th Century's petition for rehearing, and the California Supreme Court denied 20th Century's petition for review. (App. 51 and 57.)

REASONS WHY THE WRIT SHOULD BE DENIED

A. 20th Century greatly exaggerates the impact of the one year revival of certain Northridge earthquake insurance claims

The petition says that § 340.9 revived "all" time-barred earthquake claims, creating a "massive" impairment of contract rights, with an "astounding" potential to revive hundreds of thousands of claims and upset billions of dollars worth of settlements that insurers paid after the Northridge earthquake. (Petition at i, 6, 8, 16.) The enormity of the impact of the statute is key to 20th Century's claim that the issue is worthy of this Court's review, and to its argument that the impairment of its contracts is substantial.

The petition plays down, to the point of ignoring, the fact that § 340.9 was operative for only one year, from January 1, 2001 to January

1, 2002. *Hellinger v. Farmers Ins. Exch.*, 91 Cal.App.4th 1049, 111 Cal.Rptr.2d 268 (2001) (noting that the statute became effective on January 1, 2001 and extended the statute for lawsuits filed within one year of its effective date.)

20th Century filed its petition with this Court less than two weeks before the statute expired. It therefore was in a position to tell the Court exactly what the impact of the statute had been. It likely knew the total number of lawsuits that had been filed in the 11½ months the statute had been effective, and it certainly knew how many lawsuits had been filed against it. Evidently, it determined that those numbers would be far less impressive to this Court than abstract references to the total number of potential claimants the statute might affect.

The insurer in *Hellinger* claimed, as 20th Century does here, that the statute potentially revived in excess of 600,000 claims. The *Hellinger* panel was appropriately skeptical of this number, noting that nothing supported the insurer's claim that vast numbers of insureds would be eligible to avail themselves of the extension granted by § 340.9. 91 Cal.App.4th at 1065. The court explained that the reference to 600,000 potential claimants referred to the gross number of claimants, but that the restrictions within § 340.9 and the fact it was operative for only a year "severely circumscribed" the size of the subset of claimants who would file suit. *Id.*

The court further noted that it was no less speculative to posit, as it assumed the Legislature

did, that many, if not most, insureds were satisfied with the treatment they had received from their insurers, and had no desire to engage in litigation, particularly since the statute did not affect any defenses the insurer might have other than the statute of limitations. *Id.* These observations apply here, as well.

Contrary to the statement in the Question Presented as framed by the petition, § 340.9 neither revives *all* potential claims arising out of the Northridge earthquake, nor invalidates any settlement agreements. 20th Century ignores the internal restrictions on the scope of § 340.9. The statute does not revive claims unless the insured had contacted the insurer about the claim before the statute was effective; does not apply to claims that were "litigated to finality;" and does not apply to claims that were resolved with written settlement agreements that meet certain criteria. (App. 21.)

Nor does the statute void any settlements. Rather, as the court below observed, the reference to settlements "serves only to describe one of the circumstances where § 340.9 will *not* apply." (App. 32, emphasis in text.) The petition ultimately acknowledges that settlements would be voided "under one reading of the statute." (Petition at 3.) But no court has ever adopted this reading.

The petition is also inaccurate in suggesting that absent the enactment of § 340.9, insurers would have been able to close their books on the Northridge earthquake a year after it occurred.

To the contrary, even without § 340.9, Ahles would have a claim against 20th Century based on the denial of her supplemental claim. This is because California law estops insurers from asserting the one-year limitation period as a defense where, as here, the insured has relied on the insurer's representation about the origin or extent of property damage and fails to timely file suit as a result. The California Supreme Court reaffirmed this rule in *Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal.4th 1142, 1148, 113 Cal.Rptr. 2d 70 (2001).

Vu demonstrates that insurers never had a reasonable expectation under California law that their exposure for Northridge earthquake-related claims dropped to zero after the one-year limitation period expired. Rather, they continued to face claims as insureds discovered previously undiscovered earthquake damage. 20th Century's claims about the impact of § 340.9 are accordingly greatly exaggerated.

B. The decision below correctly applied this Court's settled precedents

1. Section 340.9 is a statutorily-mandated limitations period, which the California Legislature was free to extend without violating the Constitution

This Court's decisions in *Campbell v. Holt*, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483 (1885) and *Chase Securities Corp. v. Donaldson*, 325 U.S.

304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945), hold that in a civil case, there is no constitutional right to repose. Accordingly, it has been established law for over a century that a legislature may revive a civil claim that is barred by the statute of limitations.

20th Century seeks to circumvent these decisions by relying on the impairment of contract clause. It claims that § 340.9 is not actually a "statute" of limitations, but is rather a contractual limitations provision, which § 340.9 unconstitutionally impairs.

This premise — that the one-year limitation period is something other than a statute of limitations — is not supported by California law. As the Court of Appeal noted below, "The 'contractual' limitation period in 20th Century's policy is mandated by statute (Ins. Code § 2071). It is therefore properly treated as a *statute* of limitations . . . ." (App.35, emphasis in text.) *Accord, Bialo v. Western Mutual Ins. Co.*, 95 Cal.App.4th 68, 81, 115 Cal.Rptr. 2d 3 (2002) ("We reject . . . amici's claim that because the Legislature enacted the one-year notification period by requiring its insertion in the policy rather than by enacting an express limitation period, it somehow is not a limitations period.")

The California Supreme Court has consistently taken this view. In *Bollinger v. National Union Fire Ins. Co.* 25 Cal.2d 399, 406, 407, 154 P.2d 399 (1944), the court referred to the limitation period prescribed by Ins. Code § 2071 as "the short statutory limitation period in the present

case" and recognized that in enacting the one-year suit provision, "the Legislature has shortened the limitation period from four years." 25 Cal.2d at 407, 408. More recently, in *Vu*, the court stated that Ins. Code § 2071 shortened the "ordinary statute of limitations" for breach of a written contract. *Vu*, 26 Cal.4th at 1148.

This Court has observed that, "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983), citing *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S.Ct. 529, 52 L.Ed. 828 (1908). If the California Legislature is constitutionally permitted to extend a "statutory" statute of limitations (which 20th Century concedes), there is no reason why it should lack the power to extend a statutorily-mandated limitations period that it has prescribed for insurance contracts.

2. Section 340.9 is not an unconstitutional impairment of contracts

Even if the one-year period is treated differently than a statutory limitations period, § 340.9 does not run afoul of the impairment of contracts clause. Although the language in the clause is facially absolute, "its prohibition must be accommodated to the inherent police power of the State to 'safeguard the vital interests of its people.'" *Energy Reserves Group, Inc.*, 459 U.S. at 410 (ci-

tations omitted). Hence, a law does not violate the impairment of contract clause "simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 190,103 S.Ct. 2296, 76 L.Ed.2d 497 (1983). 20th Century concedes this, as it must.

Its argument, pared to its essentials, is that the California Legislature did a poor job of calibrating the amount of relief necessary to assist the group of insureds it wanted to help. But the decision below demonstrated that the Legislature gave the matter "detailed consideration." (App. 28 n. 22.) The statute it enacted provided a limited amount of relief to a limited class of potential claimants, for a limited period of time. (App. 21.) This Court has accorded substantial deference to a legislature's judgment about the necessity and reasonableness of a particular measure. *Energy Reserves*, 459 U.S. at 412. 20th Century offers no reason why the California Legislature's judgment here should not be given similar deference.

C. 20th Century raises the *ex post facto* clause for the first time in its petition

It is Ahles's understanding that this Court ordinarily will not grant certiorari on an issue that has neither been pressed nor passed on below. *See, e.g., U.S. v. Williams*, 504 U.S. 36, 41, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992). 20th Century did not press the issue that § 340.9 violated the *ex post facto* clause in the California

courts, nor did any of the courts below pass on that issue.

In any event, 20th Century offers no explanation of why this case would represent an appropriate case to reconsider its adherence to a two-century-old rule limiting the operation of the *ex post facto* clause to criminal cases. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). 20th Century's difficulty in squaring its position with this Court's decisions on the due process and impairment of contracts clauses does not create any basis to reconsider *Calder*.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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(3)

No. 01-941

In The

Supreme Court of the United States

20TH CENTURY INSURANCE COMPANY,

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES; LINDA P. AHLES,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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9 pp

TABLE OF CONTENTS

Page

I. INSURANCE POLICY SUIT LIMITATIONS PROVISIONS ARE SUBSTANTIVE CONTRACT PROVISIONS, NOT STATUTES OF LIMITATION 1

II. SECTION 340.9 IMPAIRS HUNDREDS OF THOUSANDS OF INSURANCE AND SETTLEMENT CONTRACTS 3

III. IT WOULD HAVE BEEN FUTILE TO RAISE AN EX POST FACTO CLAUSE ARGUMENT IN THE LOWER COURTS 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

A. J. Industries, Inc. v. Ver Halen,
142 Cal. Rptr. 383, 75 Cal. App. 3d 751 (1977) 4

Campbell v. Holt,
115 U.S. 620 (1885) 1

Cedars-Sinai Med. Ctr. v. Superior Ct.,
954 P.2d 511, 18 Cal. App. 4th 1 (1998) 5

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 5

Fletcher v. Peck,
10 U.S. (6 Cranch) 87 (1810) 5

Home Ins. Co. v. Dick,
281 U.S. 397 (1930) 1, 2

STATUTES

Cal. Code Civ. P. § 340.9 ..... 1, 3, 4, 5

Fed. R. Evid. 201(b) 3

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. INSURANCE POLICY SUIT LIMITATIONS PROVISIONS ARE SUBSTANTIVE CONTRACT PROVISIONS, NOT STATUTES OF LIMITATION.

Petitioner 20th Century explained that, by enacting California Code of Civil Procedure section 340.9, the California Legislature has unconstitutionally negated a suit limitations provision in hundreds of thousands of insurance contracts for claims concerning one particular event – the 1994 Northridge earthquake. Respondent Linda Ahles asserts the provision is not contractual, but simply a statute of limitations that the Legislature is free to change retroactively.

In *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), the Court rejected an argument like respondent's under similar circumstances. The insurance carriers there were relying on a one-year limitation provision *in an insurance contract*, but there was also a one-year limitation provision *in a statute* in the jurisdiction (Mexico) under which the contract was made. *Id.* at 403, n.1. When the courts of another jurisdiction (Texas) refused to honor the one-year limitation because its legislature had enacted a longer statute of limitations, this Court intervened, finding an unconstitutional deprivation of due process.

The Texas courts, this Court held, had "confused [the carriers' contractual] defense with that based on" the parallel statutory limitation period (*id.* at 411) and concluded that a state could not negate the contractual defense as it could do to the statutory defense. Expressly distinguishing *Campbell v. Holt*, 115 U.S. 620 (1885), on

which respondent heavily relies, the Court said that "[t]here is a clear difference between the revival of a liability which is unenforceable *only* because a statute has barred the remedy regardless of the will of the parties, and the extension of a liability beyond the limit expressly agreed upon by the parties." *Home Ins. Co.*, 281 U.S. at 409, n.6 (emphasis added). In language directly applicable here, the Court held:

> [Cases] in which it was held that a state may lengthen its *statute* of limitations, are not in point. [Citations.] In those cases, the parties had not stipulated a time limit for the enforcement of their obligations. It is true that a state may extend the time within which suit may be brought in its own courts, *if, in doing so, it violates no agreement of the parties*. . . . [But when] the parties have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement of the contract after the time has expired increases their obligation and imposes a burden not contracted for.

Id. at 408-09 & n.6 (emphasis added).

Respondent's argument – and the California Court of Appeal's opinion – suffer from the same fundamental confusion as the failed position in *Home Ins. Co. v. Dick*. Petitioner here is relying on the one-year limitation *in its insurance contract* with respondent. It doesn't matter – as it didn't in *Home Ins. Co. v. Dick* – that a one-year limitation is also provided by statute. Indeed, it would be particularly inappropriate for the existence of the statutory limitation period to be treated as the California Legislature's license to void the contractual limitation

period, because the long-standing practice of insurers to include in policies time limits for lawsuits substantially predates the statutory limits. A legislature should not be able to coopt a contract term by enacting it into a statute. Such a "codify and modify" strategy cannot avoid the constitutional protections promised to the contracting parties.

II. SECTION 340.9 IMPAIRS HUNDREDS OF THOUSANDS OF INSURANCE AND SETTLEMENT CONTRACTS.

Respondent tries to minimize the impact of section 340.9 by asserting that few lawsuits have been filed under the statute. But she overlooks the fact that insurers may have settled claims made under section 340.9 because of the difficulty and expense of defending lawsuits on claims that were unexpectedly revived seven years after the earthquake. Moreover, as shown in 20th Century's accompanying lodging with this Court, in just the last few weeks of December 2001, well over 1000 plaintiffs filed lawsuits under section 340.9 in the Los Angeles Superior Court. That court has been forced to enter three separate stay orders as it attempts to deal with this influx of section 340.9 litigation.[1]

Respondent also claims section 340.9 does not void any settlements, and mentions settlements only to

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[1] 20th Century requests that this Court take judicial notice of the lodged material, which includes the three stay orders. As true and correct copies of records of a court of California, these orders are the proper subject of judicial notice. Fed. R. Evid. 201(b).

describe where section 340.9 will not apply. (Opp. 5.) But section 340.9 excludes only one class of settlements from its application – those signed by California counsel. Cal. Code Civ. P. § 340.9(d)(2) (excluding from revival only those claims settled in a "written compromised settlement agreement . . . where the insured was represented by counsel admitted to the practice of law in California . . . who signed the agreement.") To the extent it is construed to revive claims that would otherwise be barred by valid settlement agreements that were not signed by California counsel, section 340.9 also impairs settlement contracts. As we have explained, settlement contracts are protected by the contract clause like any other contractual agreement.

Section 340.9's impairment of an entire class of favored settlement agreements is total if it negates negotiated contracts whenever an insured – even one represented by counsel – accepted settlement benefits, but California counsel did not sign the settlement agreement. Under that reading of the statute, a great many final settlements would be reopened by section 340.9 – settlements that insurers reasonably believed barred "reopening of the issues settled." *A. J. Industries, Inc. v. Ver Halen*, 142 Cal. Rptr. 383, 388, 75 Cal. App. 3d 751, 759 (1977).

III. IT WOULD HAVE BEEN FUTILE TO RAISE AN EX POST FACTO CLAUSE ARGUMENT IN THE LOWER COURTS.

In its petition, 20th Century also asked this Court to "reconsider *Calder* and its progeny to determine whether a retroactive civil law . . . is nonetheless unconstitutional

under the *Ex Post Facto* Clause." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (1998). 20th Century explained this is an appropriate case for the Court to reconsider *Calder* and rule that, when a state legislature retroactively eliminates vested rights in 600,000 contracts or more, with no finding of misconduct by the contracting parties, nor of necessity for the statute, the act violates the ex post facto clause.

In response, respondent argues only that this issue was not raised in the California courts. (Opp. 9-10.) But 20th Century obviously could not have asked the intermediate state court below or the California Supreme Court to reconsider this Court's precedent. *See generally Cedars-Sinai Med. Ctr. v. Superior Ct.*, 954 P.2d 511, 514, 18 Cal. App. 4th 1, 7 (1998) (highest court is the only court that can reverse its own decisions, and thus arguments against existing authority need only be presented to that court). 20th Century presented its argument at the first opportunity, and this Court should grant the petition to address this important issue.

CONCLUSION

This case involves the destruction of hundreds of thousands of private contracts, based on the "feelings of the moment" and "sudden and strong passions" of one state's legislature. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (majority opinion of Marshall, C.J.). Section 340.9's negative impact threatens to extend beyond the

insurance industry to the country's entire business environment. Approving such a profoundly expansive governmental intrusion into private contractual obligations, years after the fact, must gravely concern banks, manufacturers, landlords, and others who depend on contractual business relations. This Court should grant the petition.

Respectfully submitted,

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